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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 381

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 382

NORTHERN NATURAL GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (R. V 2257–2314) is reported at 95 P. U. R. (N. S.) 289. The opinion of the United States Court of Appeals for the Eighth Circuit (R. VI 2433–2497) is reported at 206 F. 2d 690.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1953 (R. VI 2498). The petitions for writs of certiorari were filed on September 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTIONS PRESENTED

1. Whether, in determining just and reasonable rates under Section 5 (a) of the Natural Gas Act for sales of natural gas for resale admittedly subject to its jurisdiction, the Federal Power Commission may allow only the 5-cent-per-mcf actual cost of gas produced in Kansas by Northern Natural Gas Company, where such allowance does not result in confiscation, notwithstanding an order of the State Corporation Commission of Kansas requiring all producers of gas in Kansas to attribute an 8-cent-per-mcf wellhead value to all gas so produced.

2. Whether the court below properly affirmed the allocation of depreciation expense and property taxes, 50% to demand costs and 50% to commodity costs, made by the Federal Power Commission for the purpose of ascertaining the costs of operations subject to its rate jurisdiction.

3. Whether the court below properly affirmed the Federal Power Commission's finding that on the facts of record Northern Natural Gas Company's Rate Schedule IND–1 (purportedly relat-

ing to sales for resale for industrial use only) and Rate Schedule IND–2 (purportedly covering sales of gas to distributing companies for their own use) did not concern transactions identifiably separate from Northern's sales for resale generally, and hence were subject to the Commission's jurisdiction and suspensible under Section 4 (e) of the Natural Gas Act.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717, *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set out in the Appendix, *infra,* pp. 26–31.

STATEMENT

Northern Natural Gas Company (Northern), is a "natural-gas company" within the meaning of Section 2 (6) of the Natural Gas Act (R. VI 2436). It operates an integrated natural gas pipeline system originating in the natural gas fields of Kansas, Oklahoma, and Texas (R. VI 2436, cf. map at R. V 2073). At the close of the year 1950, Northern produced about 20% of the gas sold by it and purchased the remaining 80% from other producers (R. VI 2436). At that time Northern served from its interstate pipeline system 27 nonaffiliated distributing utility companies and a wholly owned—but since absorbed—subsidiary which served some 225 cities and towns (R. VI 2436). Among its other customers were

16 large-volume, direct industrial customers (R. VI 2436). Northern's sales to the 27 distributing utilities and its subsidiary represented 91% of its sales (R. IV 2436).

On March 27, 1950, Northern filed with the Federal Power Commission, pursuant to Section 4 (d) of the Natural Gas Act, *infra*, pp. 26–27, rate filings by which it sought to increase its rates by approximately $3,200,000 (R. VI 2437). In accordance with Section 4 (e) of the Act, *infra*, pp. 27–28, the Commission suspended these filings for the five months allowed and thereafter permitted them to go into effect under bond and subject to refund (R. V 2215–2220). On October 27, 1950, Northern filed additional rate filings proposing a further increase of approximately $5,200,000 (R. VI 2437).[1] The Commission suspended these filings under Section 4 (e) for the statutory period and thereafter permitted them also to go into effect under bond and subject to refund (R. V 2235–2238). Hearings on the two applications were consolidated (R. VI 2437). The State Corporation Commission of Kansas intervened in the proceedings in November 1950 (R. I 2). The Federal Power Commission, after hearings, briefs and oral argument, issued its Opinion No. 228 and

[1] A third rate filing increasing Northern's charges to its customers by an additional $10,600,000 was filed on December 26, 1951 (R. VI 2438). No additional questions as to this filing are raised in the petitions for certiorari and consequently the facts it involves will not be set out separately.

order on June 11, 1952 (R. V 2257–2314), granting Northern rate increases amounting to approximately $5,000,000 (R. VI 2437). Petitions for rehearing filed by Northern and the State Corporation Commission of Kansas were denied except for one item which is irrelevant here (R. VI 2438).

Petitions for review were filed by Northern and the Kansas Commission in the court below (R. VI 2441–2443); the former pressed ten errors allegedly committed by the Commission (R. 2441–2442); the latter raised two issues (R. VI 2442–2443). The Court of Appeals affirmed the Commission's order in all respects except as to the rate of return.[2] The petitions for certiorari seek review of three of the issues on which the Court of Appeals affirmed. The facts pertinent to these issues are as follows:

1. *The State of Kansas Attribution Order.* As part of its integrated operations, Northern produces natural gas in the Hugoton Field, in the State of Kansas. This gas is commingled with that purchased by Northern, and after transporta-

[2] The Court held that the Commission had not made sufficient subsidiary findings to support its allowance of a 5½% rate of return and remanded the case to the Commission for further proceedings on this issue (R. VI 2492–2493, 2498). The Commission believes this action to be erroneous and intends to file a conditional cross-petition for a writ of certiorari on this question. The time within which to file this petition has been extended to and including November 17, 1953, by order of Mr. Justice Clark, dated October 8, 1953.

tion in interstate commerce, is sold to distributing companies for resale.

On February 21, 1951, the Corporation Commission of the State of Kansas issued an order,[3] assertedly for the purpose of conservation of natural gas, in which it required that all persons who have taken gas from the Hugoton Field since March 1, 1949 "attribute to all gas taken * * * for all purposes * * * the fair and reasonable minimum value of not less than eight (8) cents per thousand feet at the wellhead."[4]

In determining the just and reasonable rates for Northern's sales for resale under Section 5 (a) of the Natural Gas Act, *infra*, pp. 28–29, the Federal Power Commission rejected the claim of Northern and the Kansas Commission that it was bound by the value set by the Kansas attribution order. Instead, the Power Commission adhered to its customary method of determining rates on the basis of actual costs incurred, and allowed only the actual costs of about 5 cents per mcf

[3] The order was amended *nunc pro tunc* on March 8, 1951 (R. III 1499–1501).

[4] The order was preceded by an order dated February 18, 1949 (R. III 1325–1333), which differed from the 1951 order in that it did not require the attribution of 8 cents per mcf "for all purposes" (R. VI 2452, fn.). While the validity of the original 1949 order was upheld by the Supreme Court of Kansas (*Northern Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, rehearing denied, 170 Kan. 341) (R. III 1423–1443, 1485–1491), no review had been sought of the 1951 order.

incurred by Northern in producing the gas[5] (see R. V 2299–2301, 2303–2310). The difference between Northern's actual cost and the artificial value under the Kansas order amounts to $1,914,574 (R. VI 2453).

The Court of Appeals agreed that the Federal Power Commission was not "bound to obey the Kansas Commission's order in performing [its] function of regulating Northern's rates" (R. VI 2453). It held that since "Congress has entered the field, exercised its power and authorized its Commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail" (R. VI 2456). Judge Johnsen concurred on the ground that the Kansas order had been complied with since the rates fixed by the Federal Power Commission resulted in charges in excess of 8 cents per mcf (R. VI 2493–2497).

2. *Allocation of expenses between regulable and nonregulable sales.* Inasmuch as Northern makes sales for direct consumption, which are not subject to regulation under the Natural Gas Act, as well as sales of natural gas for resale, which are regulable under the Act, it was necessary in determining just and reasonable rates for the regulable sales to allocate the total cost of service

[5] As to gas purchased by Northern in the Hugoton Field, the Federal Power Commission allowed the actual price paid as out-of-pocket expenditures (Pet. in No. 382, p. 9, R. V 2303).

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between the two kinds of business (R. VI 2461–2462).

In making this allocation, the Commission classified the various cost items into two categories: (1) costs which are constant or fixed, that is, costs which relate entirely or predominantly to the capital outlay necessary to provide the system capacity plus those operating expenses which do not vary materially with the quantity of gas transported through the pipeline system and (2) costs which vary with the volumes of gas transported through the transmission system. The Commission then assigned these costs to "commodity" and "demand" components, the former being allocated to customers on the basis of annual volumes of gas sold and the latter allocated in proportion to the Company's sales of gas to each customer during the period of maximum demand upon the system.

As a part of this allocation of the costs of service, the Commission allocated 50% of the fixed costs of depreciation expense and property taxes to "demand" and the remaining 50% to "commodity" (R. V 2284–2286, 2287). In explaining its allocation of fixed costs, with particular reference to depreciation expense, the Commission referred to its then recent decision in *Re Atlantic Seaboard Corporation,* 94 P. U. R. (N. S.) 235, 246, where it had been pointed out that "the capital outlay for the pipeline facility is made—and justified—not only for service on the peak

days but for service throughout the year. * * * It follows that reasonably accurate results can be achieved only by allocating the fixed expenses flowing from the capital outlay to both operating functions, *viz*, capacity and volume" (R. V 2283).

Rejecting Northern's argument that both of these expenses should be charged 100% to demand, the Court of Appeals recognized that "The Commission here applies its expert judgment, it has informed the court of the reasons for its action, and the action itself is not so unreasonable that it calls for reversal. The Commission has exercised its 'judgment on a myriad of facts', and it is not for the court to overrule that informed judgment" (R. VI 2467; see also R. VI 2469, 2470).

3. *Suspension of Rate Schedules IND–1 and IND–2.* Included among the rate filings of March 27 and October 26 which the Commission suspended under Section 4 (e) of the Act, *infra*, pp. 27–28 (see *supra*, p. 4), were Rate Schedule IND–1, purportedly applicable to gas delivered to distributing utilities for resale for large industrial use only (R. V 2170, 2213), and Rate Schedule IND–2, purportedly applicable to gas delivered to the utilities for their own large-volume industrial use only (R. V 2171, 2214). The Commission found that Northern delivered gas to distributing companies in bulk without earmarking for any particular customer or use and that Northern made no sales for resale for industrial use only or for

the distributing company's own use, despite Northern's attempt to set up separate schedules for such sales (R. V 2263). In addition, the Commission found that, since the IND Schedules contained one component of the two-part rate, *i. e.*, the commodity charge, these schedules were only partial schedules and were dependent, not only for the demand charge but also for Northern's obligation to deliver, upon Northern's general CD–1 Schedule. The latter Schedule, which related to sales of natural gas for resale for all uses, was admittedly subject to Commission regulation and suspensible under Section 4 (e) (R. V 2262–4). Accordingly, the Commission concluded that the IND Schedules, inseparable from CD–1, were also within its jurisdiction and suspensible along with that Schedule (R. V 2264).

In affirming this conclusion of the Commission, the Court of Appeals stressed the fact that at the time the gas was delivered to the distributing utilities there was no way of determining the use to which it would be put (R. VI 2446) and the further fact that there were no essentially separate transactions covering the gas directly consumed by the utilities or by large-volume industrial users (R. VI 2444–2451).

ARGUMENT

1. *The Federal Power Commission is not bound by the attribution order of the State of Kansas.* (a) The State Corporation Commis-

sion of Kansas and Northern contend that, in fixing just and reasonable rates for Northern's sales for resale in interstate commerce, which are concededly subject to its exclusive jurisdiction, the Federal Power Commission should have allowed an attributed value of 8 cents per mcf, as provided in the Kansas Order, for the gas Northern produces itself in the Hugoton Field. The argument is not predicated on any claim that the 8 cents represents Northern's actual cost; on the contrary, it is undisputed that the actual cost was the 5 cents allowed by the Federal Power Commission. The contention is simply that the Federal Power Commission was required to allow 8 cents per mcf, although it would artificially inflate Northern's cost of operation by nearly $2,000,000 per year, solely because that value is fixed by the attribution order of the Kansas Commission. The position is invalid for several reasons.

This Court has often held that in reviewing rates fixed by the Federal Power Commission under the Natural Gas Act, it is not concerned with the method used by the Commission in reaching its result, but rather with whether the rate fixed is fair and reasonable or confiscatory. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 603; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324

U. S. 635, 649. Since there is no claim that the rate fixed by the Commission is confiscatory (see R. V 2265), it would be immaterial if the method used by the Commission in reaching its end result had infirmities.

But there is, in any event, no such infirmity as petitioners suggest. Their contention is in effect merely a revival—and indeed an extension[*]—of the "fair value" argument which the Commission, with this Court's approval, has consistently rejected. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 597–605; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 648–649; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 607–615; *cf. Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 505–507. For example, in the *Colorado Interstate* case, the pipeline company involved claimed that in fixing the rates for the company's sales for resale the Commission was barred by Section 1 (b), *infra,* p. 26, from including the company's production and gathering facilities in the rate base and should therefore allow "field price" or "market value" of the gas which the company produced itself, rather than its actual cost. This Court, squarely rejecting that contention, held that the Commission was not pre-

[*] The 8-cent valuation sought to be attributed to the gas produced by Northern is not a competitive price but one artificially fixed by the Kansas Commission.

cluded "from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction" (324 U. S. at 603).[7] As the court below stated, the cases establish that "Congress has vested power in the Federal Commission to regulate in the national interest the charges natural gas companies may make for the gas they sell in interstate commerce for resale and that in accomplishing the regulation the Commission is free from the compulsion of giving any weight to the element of value of the companies' gas at the wellheads" (R. VI 2455–2456).

It seems clear, then, that the Commission applied settled principles in using the actual cost to Northern in determining rates for Northern's sales. Following these principles, the Commission allowed costs of 8 cents per mcf where Northern purchased gas at this price from other producers in the Hugoton Field (see Pet. in No. 382, p. 9). It was equally within the Commission's power to allow only the 5-cent actual cost, rather than an artificial "attributed" value of 8 cents, for the gas Northern produced itself.

[7] The Court pointed out that the indirect effect which valuation and rate-fixing methods might have upon the production and gathering facilities does not constitute an invasion of the exemption contained in Section 1 (b) for "the production or gathering of natural gas" (324 U. S. at 603–604).

Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U. S. 179, on which petitioners rely (Pet. in No. 381, pp. 24–28; Pet. in No. 382, pp. 21–23), does not support their contrary view. This Court carefully pointed out in sustaining the Oklahoma order there involved that no question of conflict with the Federal Power Commission's authority under the Natural Gas Act was presented or decided. 340 U. S. at 188–189. If, as petitioners contend, there is a conflict here, it is resolved by elementary principles of federal supremacy. The Federal Commission, acting well within the scope of the power Congress conferred, has employed the repeatedly sanctioned standard of actual cost in fixing rates which are admittedly subject to its jurisdiction. There is no basis for petitioners' view that the federal power in this respect disappears because the State Commission has acted, and that the Federal Commission is bound by the Kansas attribution order to accept an artificial value as a component of the federally controlled rate.[8]

[8] *State of Wisconsin* v. *Federal Power Commission*, 205 F. 2d 706 (C. A. D. C.), pending on petitions for writs of certiorari, Nos. 280, 281, 418 this Term, relied on by petitioners (Pet. in No. 381, p. 29; Pet. in No. 382, pp. 23–24) deals with a different problem and has no relevance here. That case raises the question as to the Commission's jurisdiction over an independent producer or gatherer of natural gas which sells the gas for resale in interstate commerce at the end of production and gathering. Here, Northern's sales for resale, as well as Northern itself, are admittedly subject to regulation under the Act, and the question concerns the

It should be noted, however, that the supposed conflict with the Kansas Commission's order is highly questionable. That order has not been passed upon by the courts of Kansas. The earlier order involved in *Northern Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, rehearing denied, 170 Kan. 341, pressed by petitioners (Pet. in No. 381, p. 8; Pet. in No. 382, pp. 8, 15), required the attribution of 8 cents "for purposes of payment to producers, * * *" and not "for all purposes" as does the order here. The Kansas court in upholding the earlier order pointed out that the Federal Power Commission does not claim authority to fix a wellhead price for gas, thereby recognizing that the determination of cost of production as an incident of rate-fixing is a different matter from requiring attribution of a prescribed value at the wellhead. Recognition of this difference may well result in dissipation of the federal-state conflict petitioners assert. For, as Judge Johnsen noted in his concurring opinion (R. VI 2496), the rates Northern receives for its gas exceed 8 cents. And, as suggested both by the record in this case and the decisions involving a comparable Oklahoma order, this "realized price" may satisfy fully the Kansas

extent of the Commission's authority in determining just and reasonable rates for the sales. There is no question here, as there is in the *State of Wisconsin* case, as to regulation of sales to a pipeline company at the termination of the gathering process.

order as it is ultimately interpreted. See R. I 238; *cf. Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, 191, 192, affirming 203 Okla. 35.

(b) Petitioners also complain of several alleged procedural defects in the portion of the Commission's order dealing with the Kansas attribution order, assertedly violative of Sections 8 (b) and 10 (e) of the Administrative Procedure Act, *infra*, pp. 30–31. Northern claims particularly that the Commission's order fails to set out the reasons why the Commission refused to exercise its discretion by following the Kansas order (Pet. in No. 382, pp. 22–25).

But Northern did not claim that the Commission should follow the Kansas order as a matter of discretion; it urged that the Commission was legally bound to follow that order. See R. V 2266, 2307–2308. Moreover, while the prevailing opinion of the Commission brushed Northern's contention aside with a minimum of discussion, the concurring opinions set forth in detail the reasons why the Kansas Commission could not, through its attribution order, interfere with the rate-making functions of the Federal Power Commission (R. V 2299–2301, 2303–2310). In the circumstances, Northern's argument that the opinion should have been more detailed is obviously without merit, as is the similar contention that the Commission was required to make more findings than it did (see Pet. in No. 382, p. 26), par-

ticularly since there was no factual dispute before the Commission.*

2. *The Court of Appeals properly affirmed the Commission's allocation of depreciation expense and property taxes.* Northern contends that the Commission had previously recognized that depreciation expense and property taxes, being fixed costs, were allocable 100% to capacity or demand, and that the allocation here, 50% to demand and 50% to volume sold or commodity, is unsupported by any substantial evidence other than "an engineer's theories of 'equity,'" violating Sections 8 (b) and 10 (e) of the Administrative Procedure Act (Pet. in No. 382, pp. 28–31).

(a) Basically, the problem of allocating costs is one of requiring each class of business to bear its fair share of the total cost of service. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 588. The Natural Gas Act prescribes no allocation formula which the Commission must follow, and since rate-making

* Northern also complains that there is no finding that the rates would be unjust or unreasonable if the Commission allowed the 8-cent value fixed by Kansas (Pet. in No. 382, p. 23). Apart from the fact that such a finding is unnecessary under the method adopted by the Commission, the Commission's order expressly states (R. V 2265):

"The effect of Northern's contention would be to add a fictitious $1,914,574 to Northern's actual cost of service.

"Northern does not, and of course could not, claim that the $1,914,574 will be incurred by it, or that it represents cost. Nor does Northern contend, that disallowance of the claimed value would be confiscatory."

"is essentially a legislative function," the "courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. * * * [W]here, as here, several classes of services have a common use of the same property, difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id* at 589. "[C]onsiderations of fairness, not mere mathematics, govern the allocation of costs." *Id* at 591. See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 645–646; *Cities Service Gas Co.* v. *Federal Power Commission,* 155 F. 2d 694, 705 (C. A. 10), certiorari denied, 329 U. S. 773.

Although the Commission had in some early cases allocated depreciation expense and property taxes 100% to demand, it has, as a result of further study and experience, modified its allocation procedures in order to attribute more equitably to each class its proper share of the costs. See *Re Atlantic Seaboard Corp.,* 94 P. U. R. (N. S.) 235;[10] *Re Colorado Interstate Gas Co.,* 95 P. U. R.

[10] In *Re Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, the Commission spells out in detail the reasons why in its judgment fixed costs should be allocated 50% to demand and 50% to commodity. See 94 P. U. R. (N. S.) at 245–248. The Commission's opinion here reiterates some of these reasons and cites the *Atlantic Seaboard Corp.* case, quoting excerpts from that opinion. See R. V 2282–2286.

(N. S.) 97; *Re Mississippi River Fuel Corp.*, F. P. C. Opinion No. 234 (decided July 29, 1952).

The Commission allocated depreciation expense 50% to demand and 50% to commodity, because while the size of a pipeline is controlled to a considerable degree by the maximum loads it is planned to serve, it is used to transport gas not only at peak times but throughout the year. Accordingly, since each cubic foot of gas makes use of the pipeline, each should be required to bear its fair share of the costs, including part of the annual depreciation expense (R. V 2284–2285). As the Commission pointed out in *Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, 245–246, its experience shows that the construction of a pipeline is justified as an economic matter by the service it is expected to provide throughout the year. See *supra*, pp. 8–9. It is for these practical reasons drawn from its experience in the field, and not on an engineer's theory of equity, that the Commission exercised its judgment to allocate depreciation expense 50% to demand and 50% to commodity. See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 592.[11] Judicial review of the Commis-

[11] Since demand costs are allocated among customers on the basis of their peak demand, Northern's theory that depreciation expense should be allocated 100% to demand would result in firm customers bearing the full cost of the pipeline, while the nonregulable sales, typically interruptible, would obtain free transportation as far as demand costs are concerned, although the pipeline is used in connection with

sion's judgment in such a technical field is very limited, and since the Commission's action is not "devoid of reason," the court below properly affirmed. Cf. *Chapman* v. *Federal Power Commission,* 345 U. S. 153, 171.

(b) Although, as Northern urges (Pet. in No. 382, pp. 28–29), the Commission did not discuss its allocation of property taxes separately, this does not mean that Section 8 (b) of the Administrative Procedure Act has been violated. For the item of property taxes was merely one of several fixed costs (including depreciation expense) which the Commission had to allocate, and its reasons for allocating property taxes are obviously the same as those supporting its similar allocation of the other fixed costs.[12] Certainly, the Commission was not required to reiterate in detail the reasons for its allocation with respect to each of the innumerable fixed cost items.

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these sales to a substantial degree at all other times of the year. *Re Atlantic Seaboard Corp.*, 94 P. U. R. (N. S.) 235, 246; see, also, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 615 (Mr. Justice Jackson concurring). Since Northern's pipelines are used almost to capacity with a 95% load factor (R. I 275; II 753), Northern's emphasis on the demand element has the effect of seeking to add "an artificial and exaggerated incentive for the making of dump sales of natural gas for industrial uses" (R. V 2310, Commissioner Smith concurring).

[12] Northern's witness conceded that return on rate base and income taxes should be allocated 50% to demand and 50% to commodity (see R. V 2285–2286); [illegible] fixed costs are patently indistinguishable for purposes of allocation from property taxes and depreciation.

3. *Rate Schedules IND–1 and IND–2 are within the Commission's jurisdiction and authority to suspend.* Section 4 (e) of the Act, *infra,* pp. 27–28, authorizes the Commission to suspend rates on all sales subject to its jurisdiction, except sales for resale "for industrial use only." Northern urges that IND–1 was not subject to suspension since it related to sales for resale for industrial use only and so was removed from the Commission's suspension authority by the foregoing proviso in Section 4 (e) (Pet. in No. 382, pp. 34–36). As to Schedule IND–2, Northern claims that it related to sales to the distributing utilities for their own use, and not to sales for resale, so that under Section 1 (b) of the Act, *infra,* p. 26, it was completely exempt from Commission regulation (Pet. in No. 382, pp. 31–34).

In *United States* v. *Public Utilities Commission,* 345 U. S. 295, where electric power delivered for resale and direct consumption was commingled, this Court held that all the power was within the Commission's authority over sales for resale since there was no "record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies"; in short, there was a complete absence of "an essentially separate transaction covering the power directly consumed by the purchaser [which] is identifiable." 345 U. S. at 318. See, also,

California Electric Power Co. v. *Federal Power Commission,* 199 F. 2d 206, 210 (C. A. 9), certiorari denied, 345 U. S. 934.

The record here requires the same conclusion. The record shows, as both the Commission and the court below found, that Northern's deliveries of gas to distributing companies for their own use and for resale for industrial use were not identifiably separate from the deliveries for resale generally (R. V 2261–4; VI 2444–51). IND–1 and IND–2 were at most partial schedules relating to the commodity element of the sale and so were inseparably tied in with and dependent upon the CD–1 Schedule relating to sales for resale for all uses.[13]

Moreover, not only was all of the gas sold to a distributing company delivered in a single homogenous mass, but it was available for all uses the purchasing company might wish to make of it. There was no earmarking of gas for a particular use, much less an understanding or contractual arrangement that any part of the gas was to be used for industrial resales or for consumption by the company itself. At the time of delivery to the distributing companies, the use to which the gas would ultimately be put was unknown.

[13] IND–1 and IND–2 provided that they were available only to gas utilities which purchased "Contract Demand under Northern's Rate Schedule CD–1" (R. V 2170, 2171, 2213, 2214).

Some distributors commingled the purchased gas with their own manufactured gas with the result that there was no way of determining the ultimate destination of the purchased gas. At times all of the gas was used to meet the needs of the firm, non-industrial customers, but at other times, during off-peak periods, for example, part of the gas was available for the company's own use or for resale on an interruptible basis for industrial use (R. VI 2446).[14] In short, the sales purportedly covered by IND–1 and IND–2 were inextricably commingled, from both a physical and contractual point of view, with Northern's sales for general resale, and, accordingly, were within the Commission's authority under the Act to regulate and suspend as sales for resale.

City of Hastings v. *Kansas-Nebraska Natural Gas Co.*, 98 P. U. R. (N. S.) 1, relied on by Northern (Pet. in No. 382, pp. 32–33), is entirely consistent with the result here. In contrast to the present case, the facts there showed that "the parties had effectively established separate rates for separate sales under two separate contracts" (R. VI 2448–2449). Moreover, in the *City of Hastings* case, there was a long subsisting con-

[14] Thus, gas available for resale to large industrial users because not needed by the firm customers was not sold to the distributing utility "for resale for industrial use *only*" and, hence, does not even come within the terms of the proviso of Section 4 (e). Cf. R. V 2263; VI 2447.

tractual relation between the natural gas company and the distributor as to the latter's use of the gas (R. VI 2448); here, there not only was no contractual arrangement, but Northern filed IND–1 and IND–2 for the first time in 1950 for the purpose of defeating, in part at least, the Commission's jurisdiction and authority to suspend (R. VI 2446; see, also, R. I 116–117, 129–130, 140).

In these circumstances, the Commission's ruling, essentially factual in nature and supported by substantial evidence, is conclusive. Section 19 (b) of the Natural Gas Act. The affirmance by the court below was clearly proper, and further review by this Court is unwarranted. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 490–491; *National Labor Relations Board* v. *Pittsburgh SS Co.,* 340 U. S. 498, 502–503.

CONCLUSION

The decision below is plainly correct to the extent it has been attacked by petitioners. The court below has properly followed the standards governing review of administrative determinations and has correctly applied the pertinent decisions of this Court. There is no conflict of decisions and no need for further review. It is, therefore, respectfully submitted that the petitions for certiorari should be denied.

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NOVEMBER 1953.

APPENDIX

1. The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part:

SEC. 1.

* * * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 4.

* * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring

the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go

into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix

the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 19.

* * * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection

shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

2. The Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) provides in pertinent part:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

action is by law committed to agency discretion—

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 381

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 382

NORTHERN NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions for Writs of Certiorari to The United States Court of Appeals for the Eighth Circuit.

BRIEF FOR INTERVENERS AS RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The Order and Opinion of the Federal Power Commission (R. 2257-2314) is reported at — F.P.C. —, 95 P.U.R. (N.S.) 289. The Opinion of the Court of Appeals is reported at 206 F. 2nd 690 (R. 2433-2497).

• • • •

JURISDICTION.

The judgment of the Court of Appeals was entered on July 20, 1953. (R. 2498.)

The petition for a writ of certiorari in Case No. 381 was filed on September 26, 1953; the petition for a writ of certiorari in Case No. 382 was filed on September 28, 1953. Jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254(1), 62 Stat. 928, and 15 U.S.C., Sec. 717r(b), 52 Stat. 831.

QUESTIONS PRESENTED.

1. Whether the authority of the Federal Power Commission in fixing rates of a natural gas company for sales for resale in interstate commerce under the Natural Gas Act, is superior to the authority of a state in that same field.

2. Whether the Federal Power Commission, in its decision fixing a rate for Petitioner (a natural gas company), in allocating the cost of service to jurisdictional sales, has made sufficient findings or conclusions in support of its classification of the cost of property taxes and depreciation, in each instance 50 per cent to the demand component and 50 per cent to the commodity component.

3. Whether the Federal Power Commission has jurisdiction over sales of gas by a natural gas company to a distributing utility where such sales are made in bulk at the city gate under a single contract providing for a volume of gas, all of which is a sale for resale, even though some of such gas, after the sale is consummated at the city gate, may be used by the distributing utility itself and not resold.

4. Whether the Federal Power Commission, under Section 4(e) of the Natural Gas Act, has jurisdiction to suspend the rate, charge, or classification of service for the sale by a natural gas company to a distributing utility where such sale is made in bulk at the city gate under a single contract providing for a volume of gas, all of which

is a sale for resale, even though after such sale is consummated the distributing utility may resell some of such gas for large volume industrial use.

• • • •

STATUTES INVOLVED.

The pertinent provisions of the Natural Gas Act (Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U.S.C. Section 717-717w; as amended) and the pertinent provisions of the Administrative Procedure Act (Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U.S.C. Sections 1001-1011; as amended,) are set out in Appendix A, pp. 29-34 *infra.*

• • • •

STATEMENT.

Petitioner in Case No. 381 is the State Corporation Commission of the State of Kansas, and was an intervener in the proceedings before the Federal Power Commission and a petitioner in the Court of Appeals. The petitioner in Case No. 382, Northern Natural Gas Company, is a "natural gas company" within the meaning of the Natural Gas Act (R. 2261) with its principal place of business in Omaha, Nebraska (R. 13). The Interveners-Respondents on whose behalf this brief in opposition to the issuance of writs of certiorari is filed, are, except the State of Minnesota and the Cities of Minneapolis and St. Paul, utilities which purchase from Northern their respective supplies of natural gas for resale and distribution in the various cities and towns where they respectively have franchises so to do. Each was an intervener in the proceeding before the Federal Power Commission and, by order of the Court, was an intervener in the proceedings in the Court of Appeals (R. 2435). Each is vitally concerned in the disposition of these cases in the Supreme Court.

On March 27, 1950, Northern filed with the Federal Power Commission (Commission) proposed changes (R. 2159-2195) to its then effective F.P.C. Gas Tariff (R. 2069-2123) to effectuate a change in the form of Northern's tariff and to increase the revenues from its rates by approximately $3,200,000 annually (R. 2437). Under Section 4(e) of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. Section 717c(e), (Appendix A, pp. 29-34 *infra*) the Commission suspended such proposed rates for the statutory limit of five months (R. 2215-2220). The operations of Northern in connection with its sale of gas to the distributing utilities were not in any manner changed by the filing of the proposed changes in its F.P.C. Gas Tariff (R. 2445-2448).

On October 26, 1950, Northern filed with the Commission proposed changes (R. 2211-2214) in its then effective F.P.C. Gas Tariff to increase the revenues from Northern's rates by approximately $5,200,000 annually (R. 2437). The Commission likewise suspended such proposed changes for five months (R. 2235-2238).

These two rate filings were consolidated for hearing before the Commission (R. 2237), which rendered its decision and order on June 10, 1952 (F.P.G. Opinion 228, R. 2257-2314) rejecting Northern's proposed form of tariff and rate schedules and allowing Northern's rate increases of approximately $5,100,000 annually based upon a form of tariff and rate schedules prescribed by the Commission.

After application for rehearing (R. 2353-2399) was denied in all respects material hereto (R. 2401-2404), Northern filed a petition for review (R. 10-54) of the Commission's order in the Court of Appeals, pursuant to Section 19(b) of the Natural Gas Act, 52 Stat. 831, 15 U.S.C. Section 717r(b) Appendix A, pp. 29-34 *infra.*) This became Case No. 14706 in the court below.

On December 26, 1951, Northern filed with the Commission proposed changes (R. No. 14733, pp. 61-67) in its then effective tariff to increase its revenues by approximately $10,600,000 annually, which changes were suspended by the Commission (R. No. 14733, pp. 69-73) for five months. At

the hearing thereon Northern's direct showing to justify its contentions in support of the third rate increase was completed with the exception of the rate of return and the hearing was adjourned to a time to be fixed by the further order of the Commission (R. 14733, pp. 30-48). Thereafter the Commission Staff Counsel, on June 26, 1952, filed a motion (R. No. 14733, pp. 84-87) requesting dismissal of such third rate increase filing to the extent of $7,601,853 annually, on the basis that such figure represented issues disposed of by the Commission's order and opinion 228. The Commission sustained this motion, F.P.C. Opinion 233 (R. No. 14733, pp. 157-174) and after application for rehearing (R. 14733, pp. 180-198) was denied (R. No. 14733, pp. 205-213) Northern filed a petition for review of the Commission's order in the Court of Appeals, (R. No. 14733, pp. 1-24) pursuant to Section 19(b) of the Natural Gas Act, 52 Stat. 831, 15 U.S.C. Section 717r(b) (Appendix A, pp. 29-34 *infra*). This became Case No. 14733 in the court below.

On July 20, 1953, such court affirmed the Commission's Opinion and Order No. 228 in case No. 14706 in all respects except as to rate of return, which the Commission had fixed at 5½ per cent. Such court likewise affirmed the Commission's Opinion and Order No. 233 in Case No. 14733.

Northern seeks a writ of certiorari to review four issues, all of which are common to Cases Nos. 14706 and 14733 in the court below. Northern does not seek a writ of certiorari to review Case No. 14743 in the court below, apparently being satisfied with the Court of Appeals' disposition of the issue in that case relating to working capital. (R. 2475-2477). Additional facts will be set out in the argument on each question.

Factual Statement. Question 1.

Northern produces approximately 13 per cent of its total gas supply from its own wells and leases in the Hugoton Gas Field in the State of Kansas, for transportation and

sale in interstate commerce (R. 2436). Northern, for like purposes, also purchases a portion of its gas supply from other producers in the same field.

In carrying out its functions under the law of the State of Kansas relative to production and conservation of natural gas (General Statutes of Kansas, 1947 Supp., 55-701 to 55-713), the Kansas Corporation Commission, after hearing, issued an interim order dated February 18, 1949 (R. 1325-1333) which provided in pertinent part as follows:

> "1. No person, firm or corporation taking gas from the Hugoton Field shall take or cause such gas to be taken out of the producing structures or formations thereof without attributing thereto for purposes of payment to the producers, landowners, leaseowners and royalty owners a fair and reasonable value at the wellhead of not less than eight cents per thousand cubic feet."

Such order was contested by Northern in *Northern Natural Gas Company* v. *The State Corporation Commission of the State of Kansas, et al.*, No. 9133, District Court of Finney County, Kansas. Such court upheld the order (R. 1348-1350) and Northern appealed to the Supreme Court of Kansas, which affirmed the judgment of the District Court (R. 1423-1443), 160 Kan. 722, 222 P. 2d 704 (1950) and denied Northern's motion for rehearing (R. 1485-1491), 170 Kan. 241, 225 P. 2d 1054 (1951).

The Kansas Commission, considering all matters contained in said interim order to have been litigated and determined (R. 1495), issued an order dated February 21, 1951 (R. 1493-1497) and an order nunc pro tunc dated March 8, 1951 (R. 1499-1501), directing in pertinent part as follows:

> "2. That all persons, firms or corporations which have taken gas or caused gas to be taken from the Kansas Hugoton Field since March 1, 1949, or which are taking or causing gas to be taken from said field shall from and after March 1, 1949, attribute to all gas taken (except gas for the operation of leases), for all

purposes, including the payment to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum value of not less than eight cents per thousand cubic feet at the wellhead until the further order of the Commission in the investigation instituted in Docket No. C-164."

Before the Federal Power Commission, Northern, pursuant to the Kansas order, sought allowance for rate making purposes of the state minimum attribution value of eight cents per Mcf at the wellhead for all gas produced by it from such field (R. 1991-2021, 2023-2048). The Federal Power Commission rejected that figure, and, in lieu thereof, allowed Northern for its produced gas from such field the actual costs of such production at the wellhead as determined by such Commission—a figure of about five cents per Mcf (R. 2453). In respect to Northern's produced gas in the Kansas Hugoton Field the dollar difference as claimed by Northern between the 8¢ attribution value fixed by the State of Kansas and the actual costs allowed by the Federal Power Commission is $1,914,574 (R. 2453). Northern did not contend and, of course, could not claim that this sum was incurred by it or that it represents *cost*. Northern, further, did not contend before the Commission or the Court of Appeals that the disallowance of the claimed value would be confiscatory (R. 2452). Further, Northern did not contend before the Commission, or the Court of Appeals, nor did it attempt to show, that sound economic reasons exist for a departure from the actual cost of service basis for fixing just and reasonable rates (R. 2452, 2453).

In any event the undisputed fact recognized by the Circuit Court is that the rates fixed by the Commission and approved by the Court are in excess of 8¢ per thousand cubic feet. (R. 2496)

The Court of Appeals upheld the Commission (R. 2456).

* * * *

Factual Statement, Question 2.

Northern's business consists in part of direct sales for consumptive use and in part of sales for resale (R. 2461). In such case it is necessary to allocate costs of service between sales for resale which are subject to the Commission's jurisdiction and direct sales for consumptive use which are not subject to the Commission's jurisdiction (R. 2461-2462).

In allocating costs the Commission takes cognizance of the demand (capacity or fixed) and commodity (volumetric or variable) components of such costs (R. 2463). One of the ways of accomplishing such allocation is the use of the so-called "demand and commodity" method for allocating costs. The Congress did not prescribe the formula for determining how the interstate wholesale business whose rates are regulated should be segregated from the other phases of the business whose rates are not regulated. Under the Natural Gas Act the Commission is not required to employ any specific allocation formula. In this case, where several classes of services have a common use of the same property, difficulties of separation are obvious. Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science. *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 589.

The Commission, using the demand-commodity formula, classified property taxes and depreciation expense 50 per cent to demand and 50 per cent to commodity. This corresponds to the classification of income taxes and return approved by the Supreme Court in the Colorado Interstate case, *supra.*

The Commission, in classifying depreciation 50 per cent to demand and 50 per cent to commodity, said "Every cubic foot of gas which gets into the seller's pipeline market makes use of the pipeline facility. That is the only way in which the gas can get from the place of production to distant points of consumption. Every cubic foot of natural

gas transported must, therefore, bear its fair share of the cost of the transportation facility, which is to say, every cubic foot of gas transported must be assigned some part of the actual depreciation expense." (R. 2285.)

The Commission made further findings of fact classifying depreciation expense 50 per cent to commodity and 50 per cent to demand (R. 2284-2286).

The Commission classified property taxes 50 per cent to demand and 50 per cent to commodity (R. 2287, columns (c), (d) and (e)). While it is true that the Commission does not specifically mention property taxes in its opinion in discussing allocation of costs, it nevertheless made findings with reference to the general necessity for allocating fixed expenses to both capacity and volume. Such findings are directly applicable to property taxes (R. 2283).

The Court of Appeals rejected Northern's basic contention that fixed charges must be allocated 100 per cent to demand (R. 2470).

Factual Statement. Questions 3 and 4.

Each of Northern's rate filings of March 27, 1950, October 26, 1950 and December 26, 1951, contain a proposed rate schedule IND-1 and IND-2 (R. 2170, 2171, 2213, 2214) (Appendix C and D, etc., pp. 37 and 39 *infra*.) Except for the rate level the provisions in each such schedule were the same in each filing.

Rate schedule IND-1 purported to apply to all natural gas delivered by Northern to its gas utility customers for their large volume resales for industrial use only (R. 2170). Rate schedule IND-2 purported to apply to all natural gas delivered by Northern to its gas utility customers for their large volume industrial use only and not for resale. (R. 2171). The rate schedule setting forth the IND-1 and the IND-2 charges provided in paragraph 1 of each schedule, entitled "Availability", as follows:

> "This rate schedule is available to the purchaser hereinafter called the Gas Utility for a community where

> the Gas Utility's distribution system is connected to and receives natural gas from the pipeline system of Northern and where the Gas Utility purchases contract demand under Northern's rate schedule CD-1", (R. 2170, 2171.)

The Commission assumed jurisdiction over Northern's rate schedules IND-1 and IND-2 and suspended each for the full five months (R. 2215-2220, 2223-2228). It is clear from the "Availability" paragraph of each rate schedule that no utility customer could obtain a supply of gas which each schedule purports to cover unless such customer purchases contract demand under Northern's rate schedule CD-1 (R. 2170, 2171) (Appendix B, p. 35, *infra*). It is not disputed that if any part of the gas delivered by Northern is sold by the purchaser to a large industrial user (a sale purportedly covered by the IND-1 rate) or is used by the purchaser (a sale purportedly covered by IND-2) the volumes so used are included as part of the volumes in satisfaction of Northern's contract demand obligation under CD-1 schedule. The service contract fixes the amount of contract demand. It is the maximum amount of gas Northern is obligated to deliver to the customer and which the customer is entitled to receive on any one day. It is all delivered in bulk and received for all purposes; none for any particular purpose known prior to delivery. (R. 2447).

Rate schedules IND-1 and IND-2 are not of themselves complete schedules, but are based upon the CD-1 rate schedule, which Northern does not deny was subject to suspension and is subject to the jurisdiction of the Commission (R. 2445). Additionally, there is actually no rate for the services purportedly made available by the IND-1 and IND-2 rate schedules. Northern's rates are two-part rates consisting of a demand charge and a commodity charge. Admittedly, the IND-1 and IND-2 schedules contain only the commodity charge and reference must be had to the CD-1 schedule for the demand charge. Without reference to the CD-1 schedule the charge for the services purport-

edly available under IND-1 and IND-2 cannot be computed (R. 2447).

In addition, the Commission found that the record conclusively establishes that Northern makes no sales of gas to its utility customers for industrial use only or only for such purchaser's own use. (R. 2245.) The Commission also found that the gas to which schedules IND-1 and IND-2 were intended to apply is actually sold under rate schedule CD-1, which is applicable to sales for resale for residential, commercial and small industrial users, all such sales being subject to the jurisdiction of the Commission (R. 2245).

The factual situation with reference to the sale made by Northern to its customers is clearly set forth in the opinion of the Court of Appeals as follows (R. 2445-2447):

> "It appears that at the time Northern filed its proposed Rate Schedule IND-1 and IND-2 on March 27, 1950, it had for its main line system only one general service rate schedule, identified as its CD-1 schedule for the sale of natural gas to its gas utility customers for all uses. The rate was stated in the CD-1 rate schedule as a two-part rate, consisting of two charges, a demand charge and a commodity charge. The requirements of the utilities under the CD-1 rate schedule were determined by the requirements of their domestic commercial and small volume industrial customers and were purchased for sale for all uses. Northern was making no sales of gas to the utility customers for industrial use only or only for the gas utilities' own use. Northern's gas was delivered to them in one indistinguishable mass to the town border station, at which point the sale was consummated. Title to and control of the gas upon passing through the metering station vests in the gas utility and Northern's control and obligations are terminated. At that time the ultimate disposition of the gas is unknown. From the town border station the gas flows, usually at reduced pressures, into the gas utility's distribution system, where it is resold for residential, commercial and industrial uses. In some customer's systems, the purchased gas is commingled with gas manufactured by the gas utility, with the result that there is no way of

determining the destination of the gas purchased from Northern. At times all of the gas must be used to meet resale customers' requirements, but at other times, during off-peak periods for example, some part of the gas is available for the gas utility's own use or for resale on an interruptible basis for industrial use.

"Northern's operations were not proposed to be and were not in fact altered when it filed rate schedules IND-1 and IND-2. The schedules were created by Northern in the thought that the rates would be put beyond the authority of the Commission to suspend because they were formulated to relate by their terms to separate sales for resale made by Northern to the gas utility customers which were for industrial use only and separate sales to the utility customers which were not for resale. They were inseparably connected to the CD-1 schedule by the fact that they provided on their face that they were available only to gas utilities which purchase 'Contract Demand under Northern's Rate Schedule CD-1'."

"The contract demand is the amount estimated by the purchasing utilities as required to meet firm requirements of their domestic or residential, commercial and small industrial users on peak day. This gas when delivered by Northern is available for all these uses and at no time is gas delivered by Northern for or with the understanding that it is for industrial use only or for the purchaser's own use. No part of the gas is 'earmarked' for any particular customer or use."

ARGUMENT

Question 1.

The only question presented for review by the Kansas Corporation Commission (No. 381) and the first question presented by Northern (No. 382) are identical in substance. They each relate to the effect to be given to an order of the Kansas Corporation Commission directing all producers of natural gas in the Hugoton Field in Kansas to attribute the value of 8 cents per MCF at the wellhead. A correct copy of the order in question is set forth in each of the petitions for the writ of certiorari on pages 8 and 9 of Northern's

petition and on pages 7, 8 and 9 of the petition of the Kansas Corporation Commission.

The various applications for rate increases filed by Northern are set forth in its petition (No. 382) in which, on page 9, it says: "Before the Federal Power Commission, Petitioner, pursuant to the Kansas order, sought allowance *for rate making purposes* of the state minimum conservation price of 8 cents per MCF at the wellhead for all gas produced by it from such field." (Italics supplied)

On page 9 of the petition of the Kansas Corporation Commission is a reference to the fact that the Federal Power Commission disallowed *as an element of cost of gas* the required attribution minimum of 8 cents per MCF at the wellhead * * * on all gas produced by Northern as a producer from the Hugoton Field in Kansas.

Each of the petitioners claims error in the action of the Commission in disregarding for *rate making purposes* the attribution value of 8 cents per MCF of the Hugoton gas.

The petitioner in No. 381, the Kansas Corporation Commission, stated the question as follows:

> "May an attribution value as herein ordered by the State of Kansas as a prerequisite to production, which order concededly is otherwise regulationally valid, be refused uniform operation and effect as a state conservation measure, in a common reservoir 'because of its possible touch upon the Federal Power Commission's rate-fixing powers'?"

The petitioner in No. 382, Northern Natural Gas Company, states the question as follows:

> "Is the Federal Power Commission, *in fixing the rates* of a 'natural gas company,' legally bound to allow such company at the wellhead, for all gas produced by it, the minimum conservation price of 8 cents per thousand cubic feet in compliance with a state conservation order requiring such a minimum price to be attributed at the wellhead to all natural gas produced from a common reservoir in such state?" (Italics supplied).

The Kansas Corporation Commission, on page 18 of its petition, shows that the "refused uniform operation" of the attribution value ordered by the Commission is nothing more or less than the failure of the Federal Power Commission to allow as an element of cost of gas the 8 cents per MCF as the attributed value at the wellhead.

Thus, it will be seen that the only question raised by the Kansas Corporation Commission and the first question presented by Northern Natural Gas Company relates to the action of the Federal Power Commission in refusing to allow as an element of cost of gas which the Commission found was a fictitious item of $1,914,574.00 (Record, 2266).

In other words, the claim of each petitioner is that the Federal Power Commission erroneously refused to allow Northern Natural Gas Company the attribution value or value of the gas which it itself produced in the Hugoton Field *in lieu of the actual cost of production.*

The opinion of the Commission beginning at page 2257 of the Record shows that the Commission did establish a rate which it regarded as sufficient to enable Northern Natural Gas Company to earn a fair return upon what the Commission found to be a fair rate base.

In connection with the Kansas order the Commission made a finding of the fictitious character of the amount claimed as above noted; also it referred to the fact that Northern did not claim that the attribution value represented cost, nor did it claim that the failure to include it as an item of the cost of service would amount to confiscation.

The order of the Kansas Corporation Commission is not addressed to the Federal Power Commission, nor does it on its face make any reference to the rates which Northern should charge for its sales for resale in interstate commerce. These are the only rates which the Commission is authorized to fix and are the only rates with which it purported to deal in the filing of its Opinion No. 228 (Record, pg. 2257).

It will also be noted that the order of the Federal Power Commission undertakes in no way to interfere in any re-

spect with the right of the State of Kansas to regulate production and gathering. All rates fixed by the Commission it is undisputed, were rates for resale in interstate commerce to distributing utilities, all of which are within the exclusive jurisdiction of the Federal Power Commission.

The alleged conflict between Federal and State power which it is claimed was erroneously resolved by the Federal Power Commission and the Court below is introduced into this controversy, not by the terms of either order, but by the *claims* of petitioners that the Power Commission was bound because of the Kansas order to add $1,914,754 to Northern's revenues in prescribing a rate for sales for resale in interstate commerce under the Natural Gas Act. The Commission fixed a rate for all gas sales, not just Hugoton gas. It is of this rate that complaint is made. The question really is: "Is Federal power superior to the power of a state in the interstate rate-making field?"

It is asserted here that neither of these petitioners has by their petition shown that the decision by the Court of Appeals for the 8th Circuit in this case is either in conflict with the decision of another Circuit or that it has decided an important question of Federal law which *has not been heretofore decided* by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court. (Rule 38, paragraph 5).

On the contrary, the Record shows that the Federal power asserted by the Federal Power Commission under the Commerce clause of the Constitution and the terms of the Natural Gas Act has been sustained as superior to the power of the States in so far as the regulation of interstate commerce is concerned.

Reduced to its simplest terms the claim merely is that the Federal Power Commission was bound in computing Northern's cost of service for rate making purposes to include as an item thereof the so-called attribution value of $1,914,574.00 solely because of the fact that the Kansas Corporation Commission had ordered all producers in the

Hugoton Field to attribute a value at the wellhead of 8 cents per MCF.

That the ruling of the Federal Power Commission and its affirmance by the Court of Appeals is in accord with prior decisions of this Court seems beyond question.

This Court said in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, that long before the passage of the Natural Gas Act, states could not regulate the price of gas when sold to utility distributing companies for resale. It cited *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U.S. 298; and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83. The cases cited referred to the rate making field as one of those fields which the *states could not enter.* Therefore, under those decisions this case would not be reviewable, as the only claims of error of either the Federal Power Commission or the Court of Appeals in so far as this order is concerned, is the failure of the Commission to apply it to the rate making field. There is no claim, nor could there be, that the Natural Gas Act enlarged the field in which states could operate. In fact decisions of this Court involving various questions under the Natural Gas Act have consistently adhered to the proposition that it was enacted to "fill the gap" in regulation which had been created by the decisions of this Court excluding the states from this particular field of rate making. Attleboro, supra, is another case in which regulation of interstate rates for electricity was withheld from either the exporting or importing state. In the case of *United States* v. *Public Utilities Commission,* decided by this Court April 6, 1943, 345 U.S. 295, this Court again adhered to the principle that states were excluded from rate regulation of interstate sales for resale and that the Federal power was paramount. Of the *Attleboro* case, *supra,* the Court said: (Record, p. 2450)

> "In short, that case established what has unquestionably become a fixed premise of our constitutional law but what was not at all clear in 1920, that the Com-

> merce clause forbade state regulation of some utility rates. State power was held not to extend to an interstate sale 'in wholesale quantities not to consumers, but to distributing companies for resale to consumer'."

It was on this basis that the Court of Appeals decided this question in this case and said: (Record, p. 2456)

> "In that state of the federal law there is no room for the exercise of any local power to obstruct or prevent the lawful functioning of the federal agency entrusted with the federal power of regulation. The federal power to regulate the commerce in natural gas derives directly from the constitution and is, of course, the dominant power. To the extent that Congress has entered the field, exercised its power and authorized its Commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail. The decisions of the Supreme Court in the Panhandle, Colorado Interstate and Hope cases all turned squarely upon the issue and affirmed that Congress has made such grant of power to the Federal Commission."

Therefore, the decision of the Court of Appeals was consistent with the decisions of this Court announced both before and after the enactment of the Natural Gas Act. It is consistent with the decisions excluding the exercise of state power in the field of fixing rates for interstate sales for resale prior to the enactment of the Natural Gas Act. It is also consistent with the decisions of this Court after the enactment which hold that the delegation of the power to the Commission to regulate interstate sales for resale was exclusive of state action.

Other cases involving the question in addition to the cases cited by the Court of Appeals are *Federal Power Commission* v. *East Ohio Gas Company*, 338 U.S. 464, where this Court said that even before the Natural Gas Act state regulatory power could not reach sales for resale; and *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, where this Court said the power of Congress to remove obstruc-

tions to interstate commerce was superior to the power of a state to enact welfare legislation.

From the foregoing it is clear that the decision of the Court of Appeals is in accord and consistent with prior decisions of this Court involving the controlling principle. Therefore, the claims of Petitioners that a Writ of Certiorari should issue cannot be sustained.

Question 2.

This question it seems to us is briefly,—whether the Federal Power Commission in its decision fixing a rate for Petitioner, (a natural gas company) in allocating the cost of service to jurisdictional sales has made sufficient findings or conclusions in support of its classification of the cost of property taxes and depreciation in each instance 50 per cent to the demand component and 50 per cent to the commodity component?

At the outset it should be noted that the court in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U. S. 581, 589 announced that allocation of costs is necessarily a matter of judgment. True, after exercising judgment and determination, mathematical computations complete the answer. Allocation of costs is not, however, an exact science arrived at wholly by mathematics. It is not a matter for the slide-rule. It involves judgment on a myriad of facts.

The expert evidence as to allocation of cost was presented by one witness offered by petitioner and a staff witness. Petitioner concedes that the staff witness on question of allocation of costs was qualified as an expert on the subject. The staff witness testified that property taxes and depreciation should be allocated 50 per cent to demand and 50 per cent to commodity. The commission adopted this allocation of such costs. There was the evidence of the staff witness to support such finding.

In its opinion No. 228 the Commission fully discusses the basic reasoning adopted for allocation of depreciation (R. 2285) Therein it was said:

"Every cubic foot of gas which gets to the seller's pipe line market makes use of the pipe line facility. That is the only way in which the gas can get from the place of production to distant points of consumption. Every cubic foot of natural gas transported must, therefore, bear its fair share of the cost of the transportation facility, which is to say, every cubic foot of gas transported must be assigned some part of annual depreciation expense."

"* * * The assignment of annual depreciation expense between the demand and volumetric functions necessarily is a judgment determination. In our opinion, demand and volumetric functions should be given equal weighting in making this assignment, that is to say fifty per cent of the annual depreciation expense should be assigned to the demand factor and fifty per cent to the volumetric factor. This is consistent with the treatment Northern's witness gave to return (compensation of capital) which he assigned fifty per cent to demand and fifty per cent to volume. Depreciation and return are related items of cost. One is a return of capital while the other is a return on capital. See In the Matter of Atlantic Seaboard Corporation et al, Opinion No. 225, issued April 25, 1952, mimeographed opinion p. 22. Accordingly, we find the allocation of depreciation expense fifty per cent to volume and fifty per cent to demand is proper." (R. 2285, 2286)

Reference is then made to allocation of Administrative and General Expense which the Commission said should be divided in accordance with the method used by the staff "which is consistent with our treatment of this expense in past cases." The proper allocation of total cost of services for the test period was then summarized in a two page table which shows the result of adopting the staff witness method.

Thus we have a Commission finding on the allocation of cost of depreciation and property taxes fully supported by substantial evidence. The Commission's opinion discusses the reason for adoption of such finding.

As was said by Court of Appeals in its opinion

> "The Commission here applies its expert judgment, it has informed the court of the reasons for its action, and the action itself is not so unreasonable that it calls for reversal. The Commission has exercised its 'judgment on a myriad of facts', and it is not for the court to overrule that informed judgment. Further, we do not feel that the demand-commodity formula is so rigid and absolute that the Commission cannot alter it." (R. 2467)

We submit that the record fully discloses substantial evidence to support the Commission's finding and a sufficient discussion in the Commission's decision of the basic principles involved. It should be noted however that in any event the finding and opinion is such that it must be affirmed and sustained under the Natural Gas Act and the Administrative Procedure Act, Section 10(e).

In a letter to the Chairman of the Senate Judiciary Committee, dated October 19, 1945, as found in C.C.H.—Federal Administrative, Section 1942, Page 3041 the Attorney General of the United States commented upon the proposed Section which was adopted as Title 5, Section 1009, (e), U.S.C.A., as follows:

> "This declares the existing law concerning the scope of judicial review. The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (309 U. S. 134). Clause (5) is intended to embody the law as declared for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197). There the Chief Justice said: "Substantial evidence is more than a mere scintilla. It means that relevant evidence as a reasonable mind might accept as adequate to support a conclusion (p. 229) * * * assurance of a desirable flexibility

in adminstrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force" (p. 230).

"The last sentence of this section makes it clear that not every failure to observe the requirements of this statute or of the law is ipso facto fatal to the validity of an order. The statute adopts the rule now well established as a matter of common law in all jurisdictions that error is not fatal unless prejudicial."

Chief Judge Parker has clearly stated the rule in United States vs. Federal Power Commission (C.A. 4th 1951) 191 Fed (2) 796 where he said:

> . . . but it was for the Commission, not the courts, to say what parts of the testimony of the witnesses it would accept and what conclusions it would draw from them. And the rule is well settled that we must affirm its findings if supported by substantial evidence. The rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission. We deal with a similar question in Travelers' Indemnity Co. v. Parkersburg Iron & Steel Co., 4 Cir., 70 F. 2d 63, 64, where the contention was made that questions of fact dependent upon scientific knowledge should be decided by the court and a verdict directed accordingly. What we said there with reference to such questions being for the decision of the jury applies with even greater force here, where the question is one of substituting our judgment for that of the Commission, a body constituted by law and qualified by experience for dealing with the technical scientific matters involved."

Upon appeal to the Supreme Court the decision of the Court of Appeals was affirmed and it was there said:

> "Subordinate arguments are made bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and was devoid of reason."

United States vs. *Federal Power Commission,* 345 U. S. 153

In *National Labor Relations Board* vs. *Pittsburgh SS Co.* 340 U. S. 498, the Court has pointed out that it is not called upon to pass upon the conclusions of the Administrative Board in the first instance or to make an independent review of the review by the Court of Appeals. Certiorari should be granted only in cases involving principles the settlement of which is of importance to the public.

The same rule is announced in *Universal Camera Corp.* v. *National Labor Relations Board* 340 U. S. 474 in which the Administrative Procedure Act and the Taft-Hartley Act were involved. The court said:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Here we have the Commission adopting a formula based upon substantial evidence of an expert. In *Colorado Interstate* v. *F.P.C.*, 324 U. S. 589, the United States Supreme Court in discussing this issue said:

> "Congress indeed prescribed no formula for determining how the interstate wholesale business, whose rates are regulated, should be segregated from the other phases of the business whose rates are not regulated. Rate making is essentially a legislative function. Congress to be sure has provided for judicial review of the Commission's orders. But that review is limited to keeping the Commission within the bounds which Congress has created. When Congress, as here, fails to provide a formula for the Commission to follow courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation."

The record here clearly shows that the Commission employed an appropriate cost allocation formula based upon proper and sufficient evidence to arrive at a fair and equitable end result. The results of their allocation were also properly taken into account when determining the level of the rate components prescribed.

It follows that petitioner is not entitled to a review in certiorari of the Commission's finding on the allocation of depreciation and property tax costs as affirmed by the Court of Appeals for the Eighth Circuit.

Question 3.

Northern states, in substance, that:

(1) The decisions of the Commission and the Court of Appeals are in error in holding that "sales to gas utilities for their consumptive use under a separate rate provided for in petitioner's Rate Schedule IND-2 are subject to the Commission's jurisdiction under the Natural Gas Act, Section 1(b) notwithstanding the fact that the utilities con-

sume such gas without resale." (Petition for Certiorari, p. 32.)

(2) The decisions of the Commission and the Court of Appeals are opposed to the decision in *City of Hastings* vs. *Kansas-Nebraska Natural Gas Company,* F. P. C. , 98 PUR (NS) 1, which held that the gas used by the Petitioner City was the subject of a separate sale for consumption and not a sale for resale, and that such sale was therefore not within the jurisdiction of the Commission because of the prohibition of Section 1(b). This holding, according to Northern, was "on factual situation indistinguishable in law" (Petition for Certiorari, p. 32) from that presented here.

The first point is not valid because the Commission found that "Northern makes no sales of gas to utility customers for industrial use only or for such purchaser's own use;" (R. 2262); and the Court of Appeals held that "Northern was making no sales of gas to the utility customers for industrial use only or only for the gas utilities own use" (R. 2446). Thus, there was *no* holding that sales for consumptive use are subject to Commission jurisdiction. On the contrary, the holding was that there were *no sales for such use only.* The issue presented is purely one of fact, as to the character of the sales in question. It is certainly not the practice of this Court to take jurisdiction solely to decide a question of fact, particularly where both the original tribunal and the Court of Appeals have been in full agreement on the question.

The second point is not valid because, as shown here, it was decided that no direct sales for use were made by Northern. In the *City of Hastings* case it was found by the Commission that a separate direct sale of gas was made, which was not a sale for resale. Obviously we have entirely different findings as to the fact situations involved in the case. The Court of Appeals held in the case at bar that "in the absence of proof such as existed in the *City of*

Hastings case of direct sales for industrial use or for the purchasing utilities own use, the statute conferring the jurisdiction to regulate on the Federal Power Commission is controlling" (R. 2249). The Commission, which heard the *City of Hastings* case, felt that the facts were distinguishable. The Court of Appeals agrees. This Court should not be asked to take jurisdiction to determine a question of fact in a case not before it, which is apparently what Northern desires.

Northern claims that the decision of the Court of Appeals, in the instant case, conflicts with a decision of the Federal Power Commission in the Hastings case. This Court does not grant certiorari to resolve such a conflict, even if one exists.

It may also be noted that the decision herein is in conformity with prior decisions of the Federal Power Commission and of the courts. See, *In the Matter of Colorado Interstate Gas Co.*, 8 F.P.C. 313, 82 PUR (NS) 350; *In the Matter of California Electric Power Co.* F.P.C. , 89 PUR (NS) 359; *California Electric Power Co.* vs. *F.P.C.*, 199 F (2) 206, certiorari denied April 13, 1953 No. 495, U. S. , 97 L. Ed. (Advance, p. 679); 73 Supreme Court 794, rehearing denied May 18, 1953, No. 495, U. S. , 97 L. Ed. (Advance, P. 851); 73 Supreme Court 936; *Pennsylvania Water and Power Co.* v. *F. P. C.*, 343 U. S. 414; 96 L. Ed. 1042, 72 Supreme Court 843. *United States* vs. *Public Utilities Commission*, 345 U. S. 295, 97 L. Ed. (Advance p. 635). All these cases are in harmony, in principle, with the decision of the Court of Appeals on this issue of fact.

Question 4.

The discussion above as to the first point raised under Question 3 applies equally to Question 4, since the Court of Appeals and Commission found that no sales were made by Northern for resale for industrial use only.

In addition, the Court of Appeals and the Commission

found that the gas purchased under Rate Schedules IND-1 and IND-2 (appendix C and D, pp. infra) was included as a part of the contract demand purchased under Rate Schedule CD-1 (appendix B, p. infra) (R-2262, 2263, 2446, 2447) and that Rate Schedules IND-1 and IND-2, which were commodity schedules, provided only one part of a two-part rate, the other part of which was Rate Schedule CD-1. Thus, the rate schedules were inseparably connected, and since Rate Schedule CD-1 was *admittedly* subject to the Commission's jurisdiction, the other schedules, which were incomplete without CD-1, must necessarily be subject to the same jurisdiction. In any other view of the case, one part of a two-part rate would be subject to suspension, while the other part would not be (R-2263, 2264, 2447, 2448).

Northern has failed to include its Rate Schedule CD-1 in the Petition for Certiorari herein. The pertinent portions may be found (R. 9000 and 9001) as Appendix B, p. 35, *infra*. That rate schedule, and the service agreements made in connection with it, measure Northern's whole obligation to deliver gas to its customers, for all purposes, including use, and resale for industrial use. Additionally, Rate Schedules IND-1 and IND-2 by their terms have always applied only to "communities where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1" (R. 2170, 2171, 2213, 2214).

It is clear that service under Rate Schedules IND-1 and IND-2 is not available except in connection with service under Rate Schedule CD-1 and that the total charge for gas taken under Rate Schedule IND-1 and IND-2 includes a charge under Rate Schedule CD-1 (R. 117-123). The decision of the Court of Appeals and the Commission, that the rate schedules were inseparably connected, resolves a question of fact and is the only possible decision, in view of these facts.

Therefore, on this phase of the case, petitioner (Northern) has failed to point out any conflict between the decisions of Courts of Appeals of other circuits and the decision in the case at bar, nor any conflict between this decision and any applicable decisions of this Court.

• • • •

CONCLUSION

For all of the foregoing reasons, it is urged that the Petitions for Writs of Certiorari in cases Nos. 381 and 382, be denied.

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NATURAL GAS ACT.

Appendix A.

[Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U. S. C. §717-717w; as amended.]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Necessity for Regulation of Natural-Gas Companies

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. §717 (1946)]

Section 2. When used in this act, unless the context otherwise requires—

• • •

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Rates and Charges; Schedules; Suspensions of New Rates

Section 4.

* * *

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months, beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require

the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

Section 19. *Rehearing; Court Review of Orders*

* * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection

to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). [52 Stat. (1938); 15 U. S. C. 717r(b) (1946)]

Administrative Procedure Act

[Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U. S. C. §§1001-1011; as amended.]

Section 8. *Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record*

• • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242; 5 U. S. C. §1007(b)]

• • •

Section 10. *Judicial review of agency action*

• • •

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) un-

supported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243; 5 U. S. C. §1009(e)]

Appendix B.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

Second Revised Sheet No. 5
Superseding First Revised Sheet No. 5

RATE SCHEDULE CD-1
CONTRACT DEMAND
TOWN BORDER NATURAL GAS DELIVERY

(1) *Availability.* This rate schedule is available to the purchaser, hereinafter called the Gas Utility, for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Service Agreement for "CD-1" Rate Schedule.

(2) *Applicability and Character of Service:* This rate schedule shall apply to the Contract Demands agreed upon by Northern and the Gas Utility, as set forth in the Executed Service Agreement and in the Index of Communities and Contract Demands in Second Revised Sheets No. 46 through 53 of this Tariff. The capacity provided hereunder as Contract Demand shall be available to the Gas Utility at all times, except as provided in paragraphs (10), (12), (13.1) and any other applicable provisions in the General Terms and Conditions, for delivery of gas by Northern under any of the applicable rate schedules of this Tariff.

(3) *Rate:* The Gas Utility shall pay Northern as follows:

Demand Charge: 4.5¢ per MCF of Billing Demand for each day of the billing period.

(4) *Contract Demand:* The Contract Demand under this Schedule CD-1 shall be that agreed upon by Northern and the Gas Utility as set forth in the Executed Service Agreement and in the Index of Communities and Con-

tract Demands in Second Revised Sheets No. 46 through 53 of this Tariff. The Contract Demand shall be the maximum daily volume of natural gas Northern is obligated to deliver to the Gas Utility and shall be the maximum daily volume of gas the Gas Utility is entitled to receive, except as provided in Paragraphs 9-a) and (10) of the General Terms and Conditions.

• • • • •

Appendix C.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

First Revised Sheet No. 13
Superseding Original Sheet No. 13

RATE SCHEDULE IND-1
LARGE VOLUME INDUSTRIAL SALES FOR RESALE

(1) *Availability:* This rate schedule is available to the purchaser, hereinafter called the Gas Utility for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1.

(2) *Applicability and Character of Service:* This rate schedule shall apply to all natural gas delivered by Northern to the Gas Utility for resale in such community for large volume industrial use only. Natural gas delivered to the Gas Utility under this rate schedule shall be subject to interruption as provided in paragraphs (9), (10), (12), (13.1) and any other applicable provisions of the General Terms and Conditions.

(3) *Rate:*

The Gas Utility shall pay Northern for all gas delivered under this rate schedule during the Billing Month 14.6¢ per MCF

(4) *Minimum Bill:* None.

(5) *Prompt Payment Discount:* None.

(6) *Volume to be Billed:* The volume to be billed under this rate schedule shall be the total volume of gas delivered by Northern to the Gas Utility during the billing month for resale to large volume industrial consumers for whom gas is purchased under this rate schedule, as recorded by the individual consumer meters of the Gas Utility, adjusted to the Town Border basis of measurement, if sold on a different measure-

ment basis, as set forth in Section (1-b) of the General Terms and Conditions.

(7) *Applicable General Terms and Conditions:* This rate schedule IND-1 shall be subject to the provisions of paragraphs (1) through (13.11), inclusive, of the General Terms and Conditions of First Revised Volume No. 2 of Northern's F.P.C. Gas Tariff.

Issued by: M. L. Mead, Rate Engineer
Issued on: March 27, 1950

Proposed Effective Date:
April 27, 1950

Appendix D.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

First Revised Sheet No. 14
Superseding Original Sheet No. 14

RATE SCHEDULE IND-2
LARGE VOLUME INDUSTRIAL SALES FOR USE AND NOT FOR RESALE

(1) *Availability:* This rate schedule is available to the purchaser, hereinafter called the Gas Utility for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1.

(2) *Applicability and Character of Service:* This rate schedule shall apply to all natural gas delivered by Northern to the Gas Utility for its large volume industrial use only, and not for resale in the community where such Gas Utility is engaged in the local distribution of gas. Natural gas delivered to the Gas Utility under this rate schedule shall be subject to interruption as provided in paragraphs (9), (10), (12), (13.1) and any other applicable provisions of the General terms and Conditions.

(3) *Rate:*

The Gas Utility shall pay Northern for all gas delivered under this rate schedule during the Billing Month 14.6¢ per MCF

(4) *Minimum Bill:* None.

(5) *Prompt Payment Discount:* None.

(6) *Volume to be Billed:* The volume to be billed under this rate schedule shall be the total volume of gas delivered by Northern to the Gas Utility during the billing month for large volume industrial use by the Gas Utility, as recorded by the meters of the Gas Utility,

adjusted to the Town Border basis of measurement, if measured, on a different basis, as set forth in paragraph (1-b) of the General Terms and Conditions.

(7) *Applicable General Terms and Conditions:* This rate schedule IND-2 shall be subject to the provisions of paragraph (1) through (13.11), inclusive, of the General Terms and Conditions of First Revised Volume No. 2 of Northern's F.P.C. Gas Tariff.

This rate schedule IND-2 is included in Northern's F.P.C. Gas Tariff as a matter of convenience to Northern and its Gas Utility customers, although this rate schedule IND-2 covers the sale of natural gas not subject to the rate-making jurisdiction of Federal Power Commission.

Northern reserves the right to change this rate schedule upon sixty days written notice to the Gas Utility and subsequent to such notice the Gas Utility shall have the right upon thirty days advance written notice given to Northern to discontinue, as of the date the revised rate schedule becomes effective, the purchase from Northern of the gas to which this rate schedule is applicable.

Issued by: M. L. Mead, Rate Engineer
Issued on: March 27, 1950

Proposed Effective Date:
April 27, 1950

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No. 381

FILED
NOV 24 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY TO FEDERAL POWER COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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25-1851

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In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 381

REPLY TO FEDERAL POWER COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Opinions Below

The Opinion and Order of the Federal Power Commission (R. V 2257-2314) is reported at 95 P. U. R. (N. S.) 289. The opinion of the United States Court of Appeals for the Eighth Circuit (R. VI 2433-2497) is reported at 206 F. 2d 690.

Statement

The matters relating to jurisdiction, statutes involved, questions presented, summary of proceedings before the Federal Power Commission, short statement of the matter involved, specifications of error to be urged and reasons

relied on for allowance of the writ, have been set out in petition for writ of certiorari filed by this petitioner in cause No. 381, in the Court herein on pages 4 to 15, to which the Court is respectfully referred.

The Federal Power Commission, respondent in cause No. 381, wherein the State Corporation Commission of the State of Kansas is petitioner, filed a cross petition for writ of certiorari in cause No. 469 in the Court herein and on page 3 thereof specifically referred the Court to the brief of the respondent, Federal Power Commission, in opposition to the petition for writ of certiorari of your petitioner in cause No. 381.

Summary of Unwarranted Statements in the Brief of Federal Power Commission

The Federal Power Commission in its brief in opposition to the petition for writ of certiorari, No. 381 by the State Corporation Commission of the State of Kansas, makes a number of unwarranted statements as follows:

1. On page 12 thereof appears the following language of the Federal Power Commission:

> "But there is, in any event, no such infirmity as petitioners suggest. Their contention is in effect merely a revival—and indeed an extension—[6] of the 'fair value' argument which the Commission, with this Court's approval, has consistently rejected."

And in addition there was inserted the following footnote:

> "6. The 8-cent valuation sought to be attributed to the gas produced by Northern is not a competitive price but one *artificially* fixed by the Kansas Commission." (Emphasis supplied.)

Your petitioner, the State Corporation Commission of the State of Kansas, respectfully states to the Court that nowhere in the proceedings before the Federal Power Commission or before the United States Court of Appeals for the Eighth Circuit did your petitioner directly or indirectly or by inference or implication make any argument known as the fair value argument and such statement therefore, is entirely unwarranted as far as your petitioner is concerned. Beyond that, nowhere in proceedings before the Kansas Commission, the Kansas Supreme Court, Federal Power Commission, United States Court of Appeals for the Eighth Circuit, and nowhere before this Court has this petitioner ever contended that the minimum 8¢ order in any respect was a fair field price, going price, maximum price, or competitive price but moreover the Kansas Commission's sole position is that the withdrawal of any gas below the minimum of 8¢ per Mcf at the wellhead from the Kansas-Hugoton field under any or all conditions, except for lease usage, is waste, which is prohibited by the Statutes of the State. (See Petitioner's Petition for Writ of Certiorari, pp. 32-38.)

The determination in arriving at the 8¢ figure was the result of extensive hearings and an abundance of competent evidence before the Kansas Corporation Commission, which order promulgating the 8¢ order was finally upheld by the Kansas Supreme Court in *Northern Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, decided Oct. 7, 1950, and 170 Kan. 341, 225 P. 2d 1054, decided Jan. 6, 1951.

2. Your petitioner, State Corporation Commission of the State of Kansas, further states that nowhere in the proceedings before the Federal Power Commission or in the proceedings before the United States Court of Appeals for the Eighth Circuit did the Federal Power Commission heretofore contend that the 8¢ valuation was one *artificially fixed* by the Kansas Commission and such a contention appears for the *first time* in the footnote on page 12 of the brief filed by the Federal Power Commission, in opposition to the petition for writ of certiorari by your petitioner herein.

In the interim order dated February 18, 1949 (R. III 1328), said order of the State Corporation Commission of the State of Kansas, paragraph 4, reads as follows:

> "4. The Commission has jurisdiction and authority to determine the value of gas at the wellhead in the Kansas Hugoton Field and to require that no gas may be taken out of the producing

structures unless the takers of such gas attribute such value to the gas for purposes of payment to the producer, landowner, leaseholder, or royalty owner, and to fix a minimum wellhead price at which natural gas may be taken from the Kansas Hugoton field, when such determination and requirement or fixing of price is a necessary or appropriate means of giving effect to the intent and purpose of the statutes relating to the production and conservation of natural gas. (G. S. 1947 Supp., 55-701 to 55-713, incl.)"

And on R. III 1345 stated in its Memorandum Opinion accompanying said Order:

"A cheap price placed on any commodity depreciates its usefulness. With the variation and fluctuation in field prices, it is highly conceivable that the prevailing low prices for this irreplaceable natural resource leads to the inescapable conclusion that waste occurs because of the low prices. This we think is contrary to the intent and spirit of conservation laws and practices in this state."

And on R. III 1347 stated in its Memorandum Opinion accompanying said Order:

"We are of the opinion that this Commission has jurisdiction and authority to establish a minimum fixed price at the wellhead in this field when fixing a minimum price is necessary or appropriate regulatory means of giving effect to the intent and purpose of the statute relating to the production and conservation of natural gas. We are of the further opinion that the price of gas being paid generally in the field is inadequate and too low."

Subsequently and after said Order and Memorandum Opinion had been upheld by the Supreme Court of the State of Kansas and on February 21, 1951, the Kansas Commission entered its order (R. III 1495) in part as follows:

> "3. By reason of the full and complete hearings before the Commission and the extensive and thorough judicial review of its Interim Order of February 18, culminating in the Supreme Court decisions above referred to, the Commission considers all matters ruled upon in said Interim Order to have been fully litigated and finally determined."

Jay Kyle, General Counsel for the State Corporation Commission of the State of Kansas, read into the record a statement of the Kansas Commission relative to its attribution order of 8¢ (R. I 254-255).

> "Mr. Kyle: This is a statement of the Kansas Commission relative to its order, the attribution order of 8 cents.
>
> "Presiding Examiner: Will you proceed?
>
> "Mr. Kyle: Yes, sir. I appreciate the opportunity of taking the time of the Examiner at this time to address myself to the position of the Commission, as I have said, relating to the conservation order adopted by the Kansas Commission to establish an equitable conservation program to control rates in the State of Kansas. The attribution order, among other things, provides that no person, firm, or corporation taking gas from the Hugoton gas field of Kansas shall take or cause to be taken out of the producing structures or formations thereof without attributing for every purpose, including payment to

producers, land owners, lease owners, and royalty owners a fair and reasonable value at the wellhead of not less than eight cents per 1,000 cubic feet.

"Such order became effective March 1, 1949.

"On February 21, 1951, the Kansas Corporation Commission entered a further order in connection with the matters involved in the previous action of the Commission, implementing the Commission's earlier order.

"In order to eliminate any confusion about the interpretation by the Kansas Commission of its position and what it thinks is the application of the requirements of the orders issued by it in connection with the taking of gas and the attribution thereto for all purposes, including the payment to producers, land owners, lease owners, royalty owners, and natural gas pipeline companies, I wish to point out that if this order is not to be uniformly and equitably applied, both as to produced as well as purchased gas, the conservation program of the State of Kansas would be destroyed. In fact, we would be powerless to control waste, and that is the very thing the State of Kansas is attempting to do and which must be done.

"In order for those mentioned above to comply with our orders, the orders in Kansas, it is necessary for them to attribute to their own production in Kansas a value of not less than eight cents per Mcf at the wellhead. Any attribution by the Federal Power Commission of a wellhead price of less than eight cents per Mcf in fixing rates for natural gas companies or any other producer in the Kansas portion of the Hugoton Field evades the letter and spirit of the orders of the Kansas Corporation Commission.

"The order of the Kansas Corporation Commission has been upheld by the Supreme Court of our state. Therefore, in the light of the decisions of the Supreme Court of the United States in the Phillips Petroleum case and Peerless Oil & Gas Company case, decided December 11, 1950, we think it is crystal-clear that our action and our interpretation of what it means and the application of the conservation principles for which we have long contended for the control and elimination of waste are valid.

"The regulation applies to all gas taken from the Hugoton gas field in Kansas whether destined for interstate or intrastate consumers.

"Insofar as conservation is concerned, the national interest and the interest of producing States should be our concern. In such circumstances, the State is justifiably concerned with preventing uneconomic dissipation of one of its chief natural resources.

"In the circumstances, the Kansas Corporation Commission must insist that all producers, including natural gas company producers, comply with the orders issued by our Commission."

It is thus apparent from all of the above that the State Corporation Commission of Kansas *did not enter an "artificial" order, but did promulgate one made at the conclusion of extensive hearings and based upon competent evidence and made under the pertinent statutes pertaining to the conservation of natural resources and for the prevention of the waste thereof.* Again, the statement by the

Federal Power Commission that the order was "artificial" was entirely unwarranted.

Again, on page 13 of the Federal Power Commission brief, reference is made to the 8¢ order of the Kansas Corporation Commission as being "artificially" fixed; and again on page 14 the term "artificial" is used.

3. Another unwarranted statement by the Federal Power Commission in its brief in opposition to the petitions for writ of certiorari to the United States Court of Appeals for the Eighth Circuit, in Nos. 381 and 382, on page 14, note 8 states:

> "*State of Wisconsin v. Federal Power Commission*, 205 F. 2d 706 (C. A. D. C.), pending on petitions for writs of certiorari, Nos. 280, 281, 418 this Term, *relied on by petitioners (Pet. in No. 381, p. 29;* Pet. in No. 382, pp. 23-24)." (Emphasis supplied.)

This is a direct misquotation for the reason that on page 29 of the petition for writ of your petitioner, the State Corporation Commission of the State of Kansas, No. 381 appears the following language:

> "*The Court of Appeals* predicates its holding with respect to the applicability of the Kansas Minimum Wellhead Order largely upon the holding by the United States Court of Appeals for the District of Columbia Circuit (R. 2460) in the Phillips case. (205 F. 2d 706.) *Therein lies the basic fallacy*

of the conclusion reached by the Court below in the present proceeding.

"In the Phillips case the Court based its holding, namely that Phillips is subject to the jurisdiction of the Federal Power Commission, upon the specific fact that Phillips' sales of gas are made 'after production and gathering have been completed.' Moreover, in order to make certain that there be no misunderstanding with respect to such holding, the Court of Appeals, in that Phillips case, specifically pointed to the fact that the Peerless decision was not 'relevant' in aid of Phillips, since Phillips' sales were not wellhead sales. (R. 2461.)

"*On the other hand,* the attribution of minimum value, at the wellhead, on all gas taken out of the 'producing structures or formations,' as was the fact in the Peerless (340 U. S. 179) case, and as *is the fact under the Kansas Order,* is inseparably a part of such production of gas."

Thus, it is apparent that it was the Court of Appeals for the Eighth Circuit that relied on the case of *State of Wisconsin v. Federal Power Commission,* supra, and not your petitioner. Again, therefore, the Federal Power Commission has made an unwarranted statement in its brief in opposition to the petition.

4. Another unwarranted statement as far as this petitioner is concerned, appears in the Federal Power Commission's brief, page 16, as follows:

"(b) *Petitioners* also complain of several alleged procedural defects in the portion of the Commis-

> sion's order dealing with the Kansas attribution order, assertedly violative of Sections 8(b) and 10(e) of the Administrative Procedure Act, infra, pp. 30-31." (Emphasis supplied.)

It is respectfully submitted that, neither before the Federal Power Commission, nor before the United States Court of Appeals for the Eighth Circuit, nor in this Court, in the petition for writ of certiorari, has *this petitioner* ever complained of procedural defects. Again this statement is entirely unwarranted.

The Cause of the Conflict Between State and Federal Authority

The Federal Power Commission brought on the conflict between the State and Federal authority.

From and after January, 1951, there existed a judicially determined (*Northern Natural Gas Co. v. State Corporation Commission*, supra) valid conservation order of the State Corporation Commission of the State of Kansas requiring the attribution of a fair and reasonable minimum value of not less than 8¢ per Mcf at the wellhead as a condition precedent for the withdrawal of gas from the producing horizons of the Kansas Hugoton Gas Field. This is a function of production of gas over which the Federal Power Commission does not possess jurisdiction. 52 Stat. 821, Sec. 1(b); 15 U. S. C. Sec. 717(b).

If Northern Natural Gas Company (Northern) had not in good faith been complying with the Kansas Conservation Order the gas would never have been produced and would not have reached interstate commerce over which the Federal Power Commission exercised its jurisdiction in June, 1952, when it entered its order herein, striking down in part this prior existing valid conservation order. (R. V 2257.)

It is contended by this petitioner that the Federal Power Commission cannot defeat valid gas conservation orders of a State through any of its (Federal Power Commission) process of rate making authority, nor by its interference in the production and conservation of natural gas in Kansas over which the State, and the State alone, has exclusive jurisdiction.

Northern bitterly resisted compliance with the Kansas attribution order of 8¢ and the litigation continued through the Courts and was not conclusively decided by the Supreme Court of the State of Kansas until January, 1951 (*Northern Natural Gas Co. v. State Corporation Commission*, supra).

In this connection, it is interesting to note that counsel for the Federal Power Commission in the hearing before the Commission inquired of Mr. Blease, a witness for Northern, concerning whether or not the figures developed

by the 8¢ order were shown on Northern's books on October 1, 1950, such inquiry appears (R. I 194):

> "Mr. Kurtz: But they are not the figures that actually appeared on Northern's books on October 1, 1950; is that correct?
> "The witness: That is correct."

Again at (R. I 195) the following question was asked and answer given:

> "Mr. Kurtz: Does that appear on Northern's books, this figure of $3,166,484?
> "The witness: It does not now so appear."

This merely demonstrates that while Northern was strenuously litigating the question it did not carry this item on the books. That is as far as counsel for the Federal Power Commission seem to have pursued the subject in the record.

Your petitioner, State Corporation Commission of the State of Kansas, in its reply brief filed before the United States Court of Appeals for the Eighth Circuit in civil action No. 14704, called attention to the Court of Appeals the fact that immediately following that conclusive decision of the Kansas Supreme Court in January, 1951, that Northern pursued different tactics.

This matter was set out in the reply brief of your petitioner filed before the United States Court of Appeals for the Eighth Circuit in the following language:

"On April 27, 1951, Northern began to collect rate increases under statutory bond, which rate increases effectuated the eight-cent minimum price attribution to its own production in compliance with the Kansas Commission's order as finally upheld by the Kansas Supreme Court in January, 1951.[5]

"[5] *Northern Natural Gas Co. v. State Corporation Commission*, 170 Kan. 341, 225 P. 2d 1054."

Therefore, Northern from and after April 27, 1951, to June 11, 1952, when the F. P. C. opinion No. 228 and order was issued collecting under statutory bond, rates sufficient to include the eight-cent minimum price attribution, and the same is reflected on the books of Northern in accordance with Uniform System of Accounts, prescribed for natural gas companies in account No. 242 [6] by F. P. C.

"[6] Account No. 242. Other Deferred Credits. This account shall include advanced billings and receipts and other deferred credit items, not provided for elsewhere; also amounts which cannot be entirely cleared or disposed of until additional information has been received or which should be credited to income or to surplus accounts in the future."

"From and after June 11, 1952, the date of opinion No. 228 and order of F. P. C., rejecting the eight-cent value to be attributed under Kansas Order,[7] Northern was not collecting the minimum value of eight cents per M. c. f. until the order of the Court herein, entered on November 19, 1952, providing that from and after November 27, 1952, the increased rates could be collected under the Court refunding bond, so that from and after November 27, 1952, *again this item of eight cents per M. c. f. of attributed value appears on the books of Northern*

under Uniform System of Account No. 242, and thus once more Northern is in compliance with the Kansas Conservation Order by reason of the stay issued by the Court herein and the refunding bond approved by the Court."

Thus, it is apparent that Northern was obeying a mandate of the Kansas Supreme Court respecting the State conservation order; otherwise the State in its exclusive jurisdiction over the production of natural gas undoubtedly would not have permitted the withdrawals of Northern's owned production of gas from the producing structures of the field and the gas consequently would have never found its way into interstate commerce. *Hence this controversy would never have arisen.*

The Federal Power Commission, by striking down in part this prior existing valid gas conservation order of the Kansas Commission, through invading the field of production which is categorically denied by the Natural Gas Act, was the cause of the conflict between the State Commission and the Federal Power Commission. Now, in this Court the Federal Power Commission suggests that a conflict does not exist.

Conclusion

The Federal Power Commission's brief in opposition to the Petition for a Writ of Certiorari, entirely ignores the case of *Cities Service Gas Co. v. Peerless Oil and Gas Co.*, 340 U. S. 179 (1950) l. c. 188 cited in the Petition for Writ of Certiorari (p. 27) filed by your petitioner herein, wherein this Court among other things stated:

> *"The price regulation applies to all gas taken from the field, whether destined for interstate or intrastate consumers."* (Emphasis supplied.),

and likewise entirely ignored the portion of the opinion of *Phillips Petroleum Co. v. State of Oklahoma*, 340 U. S. 190 (1950) l. c. 192, cited in the Petition for Writ of Certiorari (p. 23) filed by your petitioner herein, wherein this Court, among other things stated:

> *"In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers, or there is little point in regulating any."* (Emphasis supplied.)

The State Corporation Commission of the State of Kansas in the case at bar was exercising its jurisdiction over Northern *as a producer* taking gas from the *same common reservoir of gas* referred to in the Oklahoma cases just above mentioned in this conclusion.

Therefore since no reasons appear to the contrary the Writ should be granted.

Respectfully submitted,

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□

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FILED
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1953

o———o———o

No. 382

o———o———o

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

o———o———o

REPLY TO FEDERAL POWER COMMISSION'S AND INTERVENERS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o———o———o

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IN THE

Supreme Court of the United States

October Term, 1953

No. 382

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY TO FEDERAL POWER COMMISSION'S AND INTERVENERS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, Northern Natural Gas Company, hereinafter undertakes to reply to the Federal Power Commission's Brief in Opposition[1] and to the Interveners' Brief in Opposition,[2] and respectfully brings to the attention of the Court the following:

STATEMENT OF FACT

In the Brief in Opposition of the Federal Power Commission, it is stated (F.P.C. Br. p. 4, footnote 1) that with respect to Petitioner's third rate filing of December

1 Hereinafter referred to as "F. P. C. Br."

2 Hereinafter referred to as "Int. Br."

26, 1951 (R. VI 2438), "no additional questions as to this filing are raised in the petitions for certiorari." Petitioner wishes to note that, while no *additional* questions are presented by the third rate filing, the issues as to which Petitioner seeks review in this Court in the first two rate filings are present in and common to the third rate filing (Pet. in No. 382, p. 1) and, therefore, the issues and Petioner's damage continue through the time the rates contained in the third filing are effective.

The Commission, based on the assumed correctness of its Opinion No. 228 with respect to Petitioner's first two rate filings, issued its Opinion No. 233 in Petitioner's third rate filing, dismissing Petitioner's contentions on the issues that are the subject of the Petition for Certiorari in case No. 382 (Pet. in No. 382, pp. 6-7). Based upon the fact that common issues were present and Petitioner's damage continues through the the entire time the rates contained in the third filing are effective, the Court below stayed Opinions Nos. 228 and 233 pending review (R. VI 2415-2420) and by Order dated September 15, 1953 (Appendix A, pp. 17-19, infra) such Court stayed the issuance of its Mandate and continued such Stay Order in effect pending this Court's determination of the issues in cases Nos. 381 and 382.

ARGUMENT IN REPLY

Question I

(a) The "end result" doctrine is not applicable to the question presented.

The idea is presented that the Supreme Court may properly decline to review the issue as to the effect of the Kansas 8-cent attribution order if it feels that the "end result" of the rates fixed by the Commission is just and reasonable (F.P.C. Br. p. 11; Int. Br. p. 14). It is stated that

this Court "is not concerned with the method used by the Commission in reaching its result." The cases cited, however, do not involve any such factors as are present in the instant case where a State agency has acted within the admitted scope of its jurisdiction setting up, as a conservation measure, a condition precedent to the production of gas from a common reservoir located in the state, which condition has been ignored by the Federal Commission in fixing rates subject to its jurisdiction. The issue in the instant case is not, therefore, the effect to be given an ordinary administrative action affecting only the regulatory theories of the administrative body and the contentions of a party subject to regulation. The issue presented here involves the conflict between the conservation efforts of a state and rate regulation by a federal agency.

Under the circumstances in this case the "end result" doctrine is clearly inapplicable since the question for determination is the effect and application that the Federal Power Commission, in fixing resale rates of Petitioner, must (or should) give to the conservation order of the Kansas Commission.

The Interveners state that the question presented "really" is: "Is Federal power superior to the power of a state in the interstate rate-making field?" (Int. Br. p. 15). Such a statement is not worthy of an answer. Petitioner has nowhere asserted that the states have any power to fix rates for sales of natural gas for resale in interstate commerce (except to the extent that §1(b) of the Natural Gas Act reserves such power to the states). Petitioner's position stated in its simplest form is that the Federal Power Commission must (or in the exercise of its discretion should) recognize the minimum well-

head conservation price fixed by the Kansas Commission as a "floor" in determining Petitioners rates,

(b) **Petitioner's contention is not a claim for "fair field price" for the gas it produces in the Kansas Hugoton Field.**

It is stated that Petitioner's contention with respect to the Kansas conservation order "is in effect merely a revival—and indeed an extension—of the 'fair value' argument which the Commission, with this Court's approval, has consistently rejected" (F. P. C. Br. p. 12). Petitioner repeats that its claim in this regard is not a claim for "fair field price" or "fair value." Commissioner Smith in his concurring opinion recognized this when he said (R. V 2307):

> Northern does not contend that this state-fixed minimum price represents the commodity value of the gas which it produces in the Hugoton field, where in fact current sales of gas have been made at somewhat higher prices.

As stated in the Petition for Certiorari in this case, the fair or actual value of the gas in question was not less than 10 cents per Mcf (R. I 200-202, 210-214, III 1479-1484). Petitioner reiterates that its claim is a conscientious effort to effectuate the requirements of the state conservation order (Pet. in No. 382, p. 21).

(c) **"Settled principles" are not decisive of this new question.**

The argument is made that since the Commission followed "settled principles," the case should not be reviewed (F.P.C. Br. p. 13; Int. Br. pp. 16-17). Such a contention begs the question. The question presented and to be determined concerns the effect of the Kansas conservation order on those principles. That question

cannot be said to be settled since it has never been presented to this Court.

(d) **The doctrine of "federal supremacy" is neither applicable nor controlling.**

The Federal Power Commission asserts that the question of its action conflicting with the conservation order of the Kansas Commission can be resolved by the application of "elementary principles of federal supremacy" (F. P.C. Br. p. 14). Such principles are neither applicable nor controlling. The state regulation here involved concerns conservation of natural gas, a field from which Congress has specifically excluded federal authority, viz., the "production or gathering" of natural gas (Natural Gas Act, §1(b)). Since the federal authority has not been extended to conservation of natural gas it cannot be supreme to the authority of the state in such field. Furthermore, the doctrine of "federal supremacy" should only be applied if state and federal regulation with respect to a subject matter cannot reasonably stand together. Here the regulation of the Federal Power Commission and the Kansas Commission conflict only because of the arbitrary application by the Federal Commission of a "utility cost formula" to Petitioner's Kansas Hugoton Field production.

(e) **Petitioner's rates, as determined by the Federal Power Commission, conflict with the Kansas conservation order.**

Both the Federal Power Commission (F.P.C. Br. pp. 6 and 15) and the Interveners (Int. Br. p. 7) intimate that there is no conflict between Petitioner's rates as determined by the Federal Power Commission and the Kansas conservation order.

The first ground presented for the theory of a lack of conflict is that since the rates fixed provide for charges in excess of 8 cents per Mcf, at delivery points hundreds of miles away from the wellhead, the Kansas wellhead conservation order has been recognized by the Federal Commission. Judge Johnsen in his concurring opinion in the Court of Appeals (R. VI 2496) indicated that that was the basis of his concurrence. He goes on to state, however, that the conclusion "is more escapive than satisfying" (R. VI 2497). With this statement, Petitioner is wholly in accord. If the Kansas conservation order is to be given any effect, the terms of the order must be given their logical and ordinary meaning. The Kansas order provides for the attribution of 8 cents *"at the wellhead."* The Kansas Commission acted within the scope of its jurisdiction in regulating the production and gathering of gas within the State of Kansas by fixing a minimum wellhead conservation price. The Federal Power Commission is, therefore, confronted *at the wellhead* with a condition of production created by the valid exercise of state power. The Federal Power Commission allowed only the accounting costs of Petitioner's production of Kansas Hugoton field gas—aproximately 5 cents per Mcf—as the *wellhead* price of the gas (R. VI 2453). Obviously, what the Federal Power Commission in effect ordered as the *wellhead* price of gas does not permit Petitioner to comply with the Kansas conservation order. The mere fact that at some point far distant from the Kansas gas field, and after accounting for costs of transportation, a charge in excess of 8 cents per Mcf is collected does not constitute compliance with the minimum *wellhead* conservation price.

The second ground suggested as to why there is no conflict between the Kansas order and the Federal Power

Commission's rate-fixing order is that the particular Kansas order has not been reviewed by the Courts of Kansas (F.P.C. Br. p. 15). This factual situation was clearly shown in the Petition for Certiorari in No. 382 (pp. 8-9). The order reviewed by the Kansas Supreme Court was an Interim Order and was slightly different in form than the order later issued. The terms of the Kansas Order, however, which is the basis of Petitioner's contention in this regard are clear. The Chairman and General Counsel of the Kansas Commission testified and stated that an allowance by the Federal Power Commission of 8 cents per Mcf at the wellhead was necessary to comply with the Kansas Order (R. I 234-249, 253-256). To say that the Kansas conservation order here involved might possibly be construed by the Kansas Supreme Court in such a way as to resolve the conflict between the State Commission and the Federal Commission is to grasp at a straw to avoid the decision of this Court. The provisions of such conservation order are entirely consistent with the holding of this Court that "the connection between realized price and conservation applies to all production in the field" (*Phillips Petroleum Co. v. Oklahoma*, 340 U. S. 190, 192).

(f) **The issue of whether the Federal Power Commission abused its discretion is properly before this Court.**

With regard to Part B of Question I in the Petition for Certiorari in No. 382 (pp. 2-3), it is the contention of the Federal Power Commission that Petitioner did not claim such Commission should give effect to the Kansas Order as a matter of discretion (F.P.C. Br. p. 16). Admittedly, Petitioner did and does maintain as its primary contention that the Federal Power Commission is legally bound to give effect to the Kansas Order. As an alternative position, however, Petitioner has maintained ever

since its Application for Rehearing before the Federal Power Commission (after it first learned the position of the Commission) that if the Federal Commission is not legally compelled to give effect to the State Order it *should* recognize it because otherwise, as stated in the Application for Rehearing before the Commission, the action of the Federal Power Commission is erroneous for the reasons that it (R. V 2360-2361):

> * * * disregards the legitimate local interest of the state in a field where the state has the paramount authority, by nullifying the justifiable action of the Kansas Corporation Commission to effect conservation of an irreplaceable natural resource; substitutes accounting cost "conventions" for an allowance of a conservation price of 8¢ per MCF to Northern for its Kansas Hugoton Field production and thereby attributes to Northern's production at the wellhead in such field a value and allowance per MCF equal only to the accounting costs associated with production, in violation of the conservation order of the Kansas Corporation Commission; fails to allow Northern as cost of service a price of 8¢ per MCF at the wellhead for Northern's Kansas Hugoton Field production or as an alternative fails to allow Northern as cost of service the market value for such production which would equal or exceed in amount the 8¢ per MCF at the wellhead fixed by the Kansas Corporation Commission; arbitrarily substitutes accounting cost theories for equity and sound economic considerations by the application of a so-called "utility rate making" theory to the production of natural gas which is a non-utility function, all of which is contrary to the record and the present and the future public interest; fails to comply with the provisions of the Federal Administrative Procedure Act, Section 8(b) (5 U.S.C.A. 1008), in that the Commission fails to set forth the reasons or basis for finding and concluding as above quoted with respect to the

> material issues of law presented; and, is arbitrary, capricious and otherwise not in accordance with the law.

That the issue of whether the Federal Power Commission *should* have given effect to the Kansas Order was before the Commission and was considered by it is shown by the dissenting opinion of Commissioner Wimberly (R. V 2311-2314), wherein it is stated (R. V 2312):

> The question is not, as has been inferred, that this Commission is asked to submit to the Kansas order in fixing the interstate rates of Northern Natural. I do not think it is too much to expect that the federal agency give proper weight to the state order when it is made abundantly clear it applies to all gas produced in the Kansas Hugoton field, whether such gas is consumed locally or in distant interstate markets.

Commissioner Smith, concurring separately, states (R. V 2309):

> This of course does not mean that this Commission would be without authority, in the exercise of its own discretion, to consider and weigh the lawful actions of duly constituted State authorities. On the contrary, if the Commission were, in a proper case, to follow what I think would be a more realistic approach to the treatment of pipeline-produced gas for rate-making purposes, it could—and I should hope that it would— give great weight to, among other factors, the minimum prices established for gas by State agencies close to and fully familiar with local conditions in the producing areas.

The issue was raised by this Petitioner in its Petition for Review filed in the Court of Appeals (R. I 19-20); was clearly presented to and argued before that Court in Petitioner's Main Brief (pp. 60-61 thereof, reproduced as Appendix B herein, pp. 20-21, infra), in Petitioner's Re-

ply Brief (pp. 22-26 thereof, reproduced herein as Appendix C, pp. 22-26, infra), and in the oral argument before the Court (transcript of oral argument, pp. 70-73).

Raising the issue in the Application for Rehearing clearly preserves it for the consideration of this Court. A similar situation existed in the case of *City of Yonkers v. United States,* 320 U. S. 685. There this Court stated (320 U. S. 685, 688):

> The Commission says that the question of its jurisdiction under §1(22) was neither presented in limine nor urged in the briefs, in the exceptions to the examiner's report, or in the oral arguments. It was, however, presented in petitions for reconsideration which the Commission denied without opinion.

This Court held the point was properly preserved for its consideration.

The Federal Power Commission has determined only (and Petitioner submits erroneously so) that it is not compelled to give effect to the Kansas conservation order. It fails or refuses to exercise its discretion so as to enforce the intent of the Natural Gas Act "to complement and in no manner usurp State regulatory authority" (See *Interstate Natural Gas Co. v. F. P. C.,* 331 U. S. 682, 690, quoting the House Committee Report). Further it does so without reasons or explanation.

The situation presented here in this regard is not unlike that discussed in *Phelps Dodge Corporation v. N. L. R. B.,* 313 U. S. 177.[2a] There this Court stated (313 U. S. 196):

> Thus the Board determined only the dry legal question of its power, which we sustained; it did not consider whether in employing that power the policies of the Act would be enforced.

2a Specifically cited in the Legislative History, Administrative Procedure Act, as a reason for including the second sentence in §8(b), to require statements of "why" discretion is so exercised

The Court said that the Board ordered reinstatement "merely because it asserted its legal power so to do" (313 U. S. 197) but complained that it could not "really tell why the Board has ordered reinstatement" (313 U. S. 196). The case was remanded to the Board, this Court stating (313 U. S. 197):

> * * * it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to *give clear indication that it has exercised the discretion with which Congress has empowered it.* (Emphasis supplied)

Certainly the same considerations are present in the instant case. Here the Commission determines only that it is not compelled to give effect to the Kansas Order but gives no indication why it should not give effect to such order, thereby complementing the State regulatory authority. In the field of federal-state relationships such as are here involved, it is not only appropriate but legally necessary that a federal administrative body exercise its authorized discretion. What this Court and this Petitioner are entitled to is that the Commission "give clear indication that it has exercised the discretion with which Congress has empowered it."

(g) The Commission opinion, refusing to give effect to the Kansas conservation order, is devoid of findings and conclusions, as well as the reasons or basis therefor, on material issues of law and discretion.

With respect to the failure of the Commission to state the reasons why it acted as it did, the Commission admits in its Brief (F.P.C. Br. p. 16) that "the prevailing opinion of the Commission brushed Northern's contention

aside with a minimum of discussion." To mitigate this serious deficiency the Commission points to the discussions set out in the two divergent concurring opinions as satisfying the requirements of the Administrative Procedure Act, §8(b). Such a contention merely raises the further substantial federal question—will the requirement of Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)) that "all decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record" be satisfied by reasons and bases set forth in two divergent concurring opinions? Obviously such requirement cannot be so satisfied in the instant case. From Commission Opinion No. 228 (R. V. 2264-2266) neither Petitioner nor this Court can determine why the *majority* refuses to give effect to the Kansas conservation order. Petitioner again calls the Court's attention to the fact (Pet. in No. 382, p. 24, footnote 27) that four Commissioners participated in the Commission decision on this issue. Two wrote divergent concurring opinions, one strongly dissented, leaving only the one remaining Commissioner as subscribing to the "reasons" set out in the majority opinion.

Aside from the question of the legal sufficiency of requiring this Petitioner and the Court to choose between divergent concurring opinions to find a basis or reason for the Commission decision, as the Commission suggests, it is Petitioner's contention that all the opinions considered together do not afford an adequate basis for the Commission action. In this connection, the instant case is not unlike the case of *City of Yonkers v. United States*, 320 U. S. 685, where there was involved the question of the authority of the Interstate Commerce Commission to

allow a carrier to abandon certain portions of its railroad line. By statute[3] the authority of the Commission to allow abandonment "shall not extend" to certain street, suburban, or interurban electric railways. The Interstate Commerce Commission in authorizing the abandonment in question did not discuss the limitations on its authority as set out in Section 1(22).

On appeal to this Court from a ruling by a three-judge District Court in favor of the I. C. C., this Court reversed, stating (320 U. S. 692):

> We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of §1(22). But that is to deal too cavalierly with the Congressional mandate and *with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.* (Emphasis supplied)
>
> This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.

An analogous situation is presented in the case at bar in that the specific exclusion of Commission jurisdiction from "production and gathering"[4] is nowhere mentioned

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3 Section 1(22) of the Interstate Commerce Act, 49 U. S. C. §1(22).

4 Section 1(b) of the Natural Gas Act, 15 U. S. C. §717(b).

in the majority opinion or in the two separate concurring opinions. There is no way of knowing whether the Commission considered Section 1(b) of the Natural Gas Act, or of knowing how the Commission construes that section if it did give consideration to it. In this case, as in the *City of Yonkers* case, "we are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act." Here, too, such a presumption deals "too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition."

Question II

With respect to the question of allocation of costs, Petitioner challenges the Commission's failure to set forth any discussions, conclusions, or findings in respect to its classification of property taxes,[5] and challenges the substantiality of the evidence supporting the classifications of depreciation and property taxes.

With respect to the Commission's failure to support its classification of property taxes, the frank admission that such classification was not discussed in its Opinion obviates the need for further reply.

In respect to substantiality of evidence the only record evidence supporting the classifications made with respect to depreciation and property taxes is that of a Commission Staff *engineer's* theories of *equity*. The Federal Power Commission now says that such classifications were based on "practical reasons drawn from [the Commission's] experience in the field, and not on an engineer's theory of equity" (F.P.C. Br. p. 19). Suffice it

5 The Commission admits that its classification of property taxes was not discussed in its Opinion (F. P. C. Br. p. 20).

to say that the Commission's "practical reasons" are not record evidence in this case. Petitioner challenges the substantiality of the evidence presented on the record. To substitute "experience" for *competent factual* record evidence is to ignore the fact that every "natural gas company" necessarily presents a different factual picture to be considered by the Commission. The decision of the Commission must be based on the factual situation presented by a particular natural gas company in a particular phase of its development. The Commission Staff engineering witness who testified in this proceeding had or should have had all the knowledge that reasonably could be obtained about Petitioner and its operations. With his background of investigation of Petitioner's business, his record evidence which was to constitute the "substantial evidence" necessary for the Commission's decision consisted solely of his theories of "equity" (R. I 456-457, 506-507). Petitioner reiterates that such evidence is not "substantial evidence" within the meaning of Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §1009(c).

Questions III and IV

With respect to questions III and IV, neither the Federal Power Commission nor the Intervener Respondents have set forth any matters that should defeat the Petition for Writ of Certiorari on these questions.

As a matter of the Court's convenience in considering these questions, however, Petitioner directs the Court's attention to the fact that each of the rate schedules involved (IND-1 and IND-2) is a separate and distinct rate schedule involving resale sales in the case of one (IND-1) and direct sales in the case of the other (IND-2) and, therefore, each presents a separate and distinct legal problem. Throughout the entire course of these proceedings, both

before the Commission and the Court below, there has been a lamentable tendency to consider the two rate schedules as presenting essentially one problem and to slur over the distinct legal difference in the questions presented by each.

CONCLUSION

No reasons have been advanced in the Briefs in Opposition which detract from Petitioner's position as set out in the Petition for Writ of Certiorari in No. 382. The Writ should be granted.

Respectfully submitted,

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November, 1953

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1953
Tuesday, September 15, 1953

No. 14704

State Corporation Commission of the State of Kansas,
Petitioner,

vs.

Federal Power Commission.

No. 14706

Northern Natural Gas Company, a Corporation,
Petitioner,

vs.

Federal Power Commission.

No. 14733

Northern Natural Gas Company, a Corporation,
Petitioner,

vs.

Federal Power Commission.

No. 14743

Northern Natural Gas Company, a Corporation,
Petitioner,

vs.

Federal Power Commission.

Petitions to Review Orders of Federal Power Commission.

ORDER

Before Judges Sanborn, Woodrough and Johnsen, Circuit Judges.

On Consideration of the separate motions of the Northern Natural Gas Company and the State Corpora-

tion Commission of the State of Kansas to stay mandate and continue in effect previously issued stay order pending application to the Supreme Court for a writ of certiorari, the separate resistances to such motions by the Federal Power Commission and by certain Interveners, the separate motions of the Federal Power Commission and certain Interveners to dissolve such previously issued stay, and the motion of certain Interveners for an order of refund to Interveners of amounts collected from them under the stay order, as well as the various showings of the several parties in relation to each of these matters.

IT IS ORDERED:

(1) That the motions of Northern Natural Gas Company and State Corporation Commission of the State of Kansas for stay of mandate in relation to the decision of this Court on the merits of the case be and hereby are granted, and that such mandate is hereby accordingly stayed until October 3, 1953, or, if on or before that date there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court showing that petition or petitions for certiorari, record and supporting brief have been filed by Northern Natural Gas Company and State Corporation Commission of the State of Kansas, then such stay of mandate shall continue in effect until the issuance of mandate by the Supreme Court in the case.

(2) That the stay of the order of the Federal Power Commission, heretofore granted shall be permitted to remain in effect, in its present form and upon its present conditions, until October 3, 1953, or, if petition for certiorari is duly filed before that time, then until the ruling by the Supreme Court upon such petition.

(3) That upon a ruling by the Supreme Court on the petition for certiorari as aforesaid, either granting or

denying the same, any of the parties hereto may make application to this Court for vacation or modification of the stay order, as may be appropriate in relation to the certiarori ruling, and jurisdiction is hereby reserved to make such order of vacation or modification as shall seem to the Court at that time to be appropriate.

(4) That in all other respects the various requests of the several parties are hereby denied.

September 15, 1953.

APPENDIX B

Excerpts (pp. 60-61) from Northern Natural Gas Company's (Petitioner's) Main Brief in the Court of Appeals for the Eighth Circuit in Cases Nos. 14704, 14706, and 14733—the cases as to which review is sought in this Court:

Even if we assume, arguendo, that the Commission is not required by law to recognize the conservation order of the State of Kansas in fixing rates in connection with production owned by a natural gas company whose rates it regulates (which assumption Petitioner specifically denies) how can the Commission argue or deny, in view of statements such as the foregoing, that their denial of Petitioner's claim for attribution is anything other than arbitrary, capricious and a most serious abuse of administrative discretion and, therefore, erroneous as a matter of law?[27] Most certainly it cannot be argued that the Commission is compelled to disallow Petitioner's claim for attribution. Absent compelling reasons outside the Natural Gas Act, such as the Kansas Commission's conservation order, the Commission is not bound for rate-making purposes "to the service of any single formula or combination of formulas." See *F. P. C. v. Natural Gas Pipe Line Co.*, 315 U. S. 576, 586, 61 S. Ct. 735, 743 (1942).

In the light of the decisions of the *Cities Service* and *Phillips* cases, supra, upholding, without qualification, the authority of state regulatory bodies over production of gas, including fixing a minimum attribution price in

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27 See Federal Administrative Proceedure Act, Section 10(e) (5 U. S. C. §1009 (e)) providing that the reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

the interest of conservation, it seems unmistakably clear that such power being granted, and validly exercised, it must then, as a matter of law, be recognized by the Federal Power Commission for rate-making purposes and reflected in rates fixed by such Commission and ultimately in consumer rates. As pointed out above, an examination and consideration of public interest makes this conclusion inevitable.

APPENDIX C

Excerpts (pp. 22-26) from Northern Natural Gas Company's (Petitioner's) Reply Brief in the Court of Appeals for the Eighth Circuit in Cases Nos. 14704, 14706, and 14733—the cases as to which review is sought in this Court:

2. Assuming arguendo, absence of such legal compulsion, the Commission's refusal to include this attribution price in the fixing of Petitioner's rates is arbitrary, capricious and an abuse of discretion and on this ground should be reversed.

Even if it be assumed, solely and exclusively for the purpose of argument, that the Commission as a technical legal proposition is not compelled to allow as a part of the city gate rate the wellhead conservation or floor price fixed by the Kansas Commission, the refusal to allow the 8c wellhead price on the facts of the instant case is arbitrary, capricious, unreasonable and an abuse of discretion and, under the standards of the Administrative Procedure Act, warrants reversal on that ground alone (Pet. Br. pp. 59-61).[38]

Relying on several court expressions, the Commission has repeatedly reasserted that in its rate making functions it is not bound by any particular formula or combination of formulas (e. g., F. P. C. Br. p. 27, n. 14; p. 37). This means, as applied to the instant case, that there is not a single obstacle to the allowance of the 8c attribution price in Petitioner's city gate rates.[39] Then next when

38 See Federal Administrative Procedure Act, Section 10(e) (5 U. S. C. § 1009 (e)) providing that the reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *."

39 See concurring Opinion of Commissioner Smith, R. 13091 [R. V 2306].

we observe the Commission's line of reasoning in its recent *Phillips* Opinion,[40] and particularly the position being urged by the Commission in the Court of Appeals (D. C.) in the same case,[41] recognizing the crucial and key importance of price and price increases as a necessary and legally permissible tool of conservation, it is patently clear that the Commission's action in the instant case is sheer whim or caprice.

The Commission seeks to extricate itself from its dilemma (F. P. C. Br. p. 37). Referring to the Commission's own *Phillips* decision it states: "It was there held that the Act [Natural Gas Act] *excludes* from [Federal Power] Commission regulation INTERSTATE sales made in the course of production or gathering,"[42] and then goes on to say "we are not concerned here with such sales but with how Federal authority may be applied to sales conceded to be within the jurisdiction of the Federal Power Commission." What does this mean? It obviously means that if the Kansas Commission's conservation price is embodied in the price paid to a producer, in an INTERSTATE sale, which is made either at the well mouth or at the end of the gathering lines, the Commission would fully recognize that price in the city gate rate of the gas-pipeline-company purchaser (which it does in the case of Petitioner's purchased gas in the instant case). But where the same Kansas Commission wellhead price, as a matter of sheer geography, is similarly involved in an INTERSTATE sale at a city gate, the Commission will

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40 Re Phillips Petroleum Company, F. P. C. Docket No. G-1148, Opinion No. 217 (Pet. Br. pp. 49-51).

41 State of Wisconsin, et al v. Federal Power Commission (C. A., D. C.), No. 11247 (Pet. Br. pp. 59-60).

42 This, of course, refers to sales made either at the wellhead or at the end of the gathering lines.

treat the Kansas Commission Order as a nullity. The Commission has failed to analyze or justify the rationale by findings in its Opinion (R. 13047-13048).

Not only does the Commission decision violate the Administrative Procedure Act, Section 10(e)[43] but it likewise violates Section 8(b) of such Act.[44] It is clear under Section 8(b) that the Commission must include findings and conclusions on relevant issues of administrative discretion. The House Judiciary Committee in its explanation of the provisions of Section 8(b) (House Rep. No. 1980, 79th Cong., 2nd Sess., reprinted in Leg. Hist. Vol. p. 273) said:

> It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often appear to determine only whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions.

Nowhere does the Commission say *why* they should, in their discretion, treat the Kansas Commission Order as a nullity with respect to Petitioner's produced gas in the Kansas Hugoton Field (assuming for the purpose of this argument only that the Commission is not legally

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43 See supra, n. 38, p. 22.

44 The Administrative Procedure Act, Section 8(b) [5 U.S.C. § 1007 (b)], provides in part as follows: "* * * All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *." [Emphasis supplied.]

bound to give full force and effect to the Kansas Commission Order). The Commission has not or cannot argue that it is legally bound to ignore such order and treat it as a nullity.

Petitioner has previously set forth the failure of the Commission to disclose the reasons justifying its treatment of the Kansas Order as a nullity in respect to Petitioner's production in the Kansas Hugoton Field (Pet. Br. pp. 65-73, particularly pp. 67-68). Among pertinent inquiries logically addressable by this Court to the Commission's action are these:

1. Has the Commission found that the Kansas Commission Order imposes, or attempts to impose, an embargo against the movement of its gas in Interstate commerce?

2. Has the Commission found that the Kansas Commission's Order in any wise discriminates against interstate commerce in the gas produced in the Kansas-Hugoton field?

3. Has the Commission found that the Kansas Commission Order does not safeguard an obvious state interest?

4. Has the Commission found that the local interest at stake in the Kansas Commission Order does not outweigh whatever national interest there might be in the province of the state restriction?

5. Has the Commission found that the public interest is served, and, if so, why and to what extent by its refusal to recognize the Kansas Commission's 8 cent Order as a floor in fixing Petitioner's rates?

It is submitted that in its treatment of the Kansas Commission Order the arbitrariness of the Commission's action, its abuse of discretion and its failure to make findings in answer to the inquiries indicated above warrant the reversal of its Order (Administrative Procedure Act, Sections 8(b) and 10(e); Pet. Br. pp. 65-73).

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CITATIONS

Cases:

Bluefield Water Works & Imp. Co. v. *Public Service Commission*, 262 U. S. 679 — 12

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U. S. 581 — 6, 11

Colorado Interstate Gas Co. v. *Federal Power Commission* (C. A. 10) No. 4541 (decided October 29, 1953) — 9, 12, 14–15, 16, 17

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 — 6, 8, 9, 10, 11, 13, 14

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Hope Natural Gas Co., 3 F. P. C. 150 — 13

Mississippi River Fuel Corp. v. *Federal Power Commission*, 163 F. 2d 433 — 12, 14, 16

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Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U. S. 635 — 6, 13

Pennsylvania Water & Power Co. v. *Federal Power Commission*, 193 F. 2d 230, affirmed, 343 U. S. 414 — 6, 14

Safe Harbor Water Power Corp. v. *Federal Power Commission*, 179 F. 2d 179, certiorari denied, 339 U. S. 957 — 9, 14

United Railways v. *West*, 280 U. S. 234 — 6

Statutes:

Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et. seq:*

Sec. 5 (a) — 20

Sec. 19 (b) — 21

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

NORTHERN NATURAL GAS COMPANY, ET AL.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

On September 28, 1953, respondents herein, the State Corporation Commission of the State of Kansas and Northern Natural Gas Company, filed petitions for writs of certiorari (Nos. 381 and 382, respectively) in the above-entitled proceedings seeking review of certain parts of the judgment rendered by the United States Court of Appeals for the Eighth Circuit which were decided adversely to them. The Federal Power Commission has filed a brief in opposition to the granting of these petitions.

The Acting Solicitor General, on behalf of the Federal Power Commission, prays that in the event this Court grants the petitions for writs of certiorari in Nos. 381 and 382 or either of them,

a cross-writ of certiorari be issued to review that additional portion of the judgment of the United States Court of Appeals for the Eighth Circuit as indicated by the statement of question presented, *infra*.

OPINIONS BELOW

The Opinion and Order of the Federal Power Commission (R. V 2257–2314) is reported at 95 P. U. R. (N. S.) 289. The opinion of the United States Court of Appeals for the Eighth Circuit (R. VI 2433–2497) is reported at 206 F. 2d 690.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1953 (R. 2498). By Order of Mr. Justice Clark dated October 8, 1953, the time within which to file this cross-petition was extended to and including November 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether the Court of Appeals could lawfully set aside a rate of return fixed by the Federal Power Commission based upon substantial financial data, without finding that the rate of return is confiscatory.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 20–21.

STATEMENT

A full statement of the facts involved and of the proceedings before the Federal Power Commission and before the Court of Appeals has been set forth in the brief of the Federal Power Commission in opposition in Nos. 381 and 382, to which the Court is respectfully referred. The facts pertinent to the issue raised by this cross petition may be summarized as follows:

One of the elements on the basis of which the Federal Power Commission allowed to Northern Natural Gas Company an over-all rate increase of about $5,000,000 was its conclusion, after examination of all the available evidence in the record, that a 5½% rate of return on Northern's rate base of about $140,000,000 would produce a fair and reasonable end result (R. V. 2271). This rate of return would allow Northern, after the payment of the 2.55% interest on its long term debt constituting 56% of its capitalization, a return of 9.25% on its common stock equity which after deducting ½% cost of flotation, leaves a net return of 8.75% to the equity owner.[1] Under Northern's past practice of paying out 62.7% of its earnings as dividends and trans-

[1] The common stock equity which constitutes the remaining 44% of Northern's capitalization, includes, the par value of the common stock, premiums thereon and capital and earned surpluses.

ferring the balance of 37.3% to surplus, this return of 8.75% represents a dividend yield of 5.49% (R. V 2274).

The Commission reached the conclusion that a return of 8.75% and a dividend yield of 5.49% to Northern stockholders would be a fair and reasonable end result upon an examination of investors' requirements as evidenced by the earnings-price ratios and dividend yields on common stocks of the only seven natural-gas companies (including Northern) whose common stocks are actively traded on recognized stock exchanges (see R. I 187–188), and upon a study of similar data with respect to Northern's own common stock (R. V 2273). It found that an over-all return of 5½% would provide a yield on Northern's equity in excess of the average earnings-price ratio and yield since 1945 of the seven natural-gas companies and higher than the average earnings-price ratio and yield for 1951 for these companies as well as for Northern.

While the Court of Appeals affirmed the order of the Federal Power Commission in all other respects, it reversed the Commission's conclusion as to the sufficiency of a 5½% rate of return, and remanded with directions to make additional findings and conclusions on this score (R. VI 2482–2492). The fundamental basis for this ruling was the court's belief that the Commission's reasoning was inadequate because certain factors

discussed by the Commission in the rate-of-return portion of other decisions were not referred to in the rate-of-return section of this decision.

SPECIFICATION OF ERROR

The Court of Appeals erred in reversing the determination by the Federal Power Commission that a 5½% rate of return would be just and reasonable and in remanding the case to the Commission with directions to make additional findings and conclusions on that issue.

REASONS FOR GRANTING THE WRIT

In this case, the Federal Power Commission has determined that 5½% would be a just and reasonable rate of return to Northern primarily on the basis of financial materials relating to Northern and other companies engaged in the natural gas business. The court below reversed the Commission's conclusion because the Commission's opinion did not contain specific findings as to Northern's markets and adequacy of its gas reserves, etc., and further because there was testimony in the record which would support a higher rate of return. This holding not only conflicts in principle with decisions of the Court of Appeals for the Tenth and District of Columbia Circuits, but it disregards the controlling decisions of this Court.

1. "The question for the courts when a rate order is challenged is whether the order viewed

in its entirety and measured by its end results meets the requirements of the Act." *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 605; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, 649; *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U. S. 414, 424. In determining a fair and reasonable rate of return, the Commission is required to allow a return sufficient to maintain the financial integrity of the company. It must allow for service on the long-term indebtedness, reasonable dividends on the stock, and a sufficient margin of earnings for transfer to surplus. Cf. *United Railways* v. *West,* 280 U. S. 234, 251–252. The return to the stockholder "should be commensurate with returns on investments in other enterprises having corresponding risks," so as to maintain the company's "credit and to attract capital." *Federal Power Commission* v. *Hope Natural Gas Co., supra* at 603; *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra; Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra* at 650. This standard is by no means vague or meaningless, for it is of a financial nature "resting on stubborn facts" (*Colorado Interstate Co.* v. *Federal Power Commission,* 324 U. S. 581, 605), even if it may be difficult, if not impossible, to cast it into a legalistic formula (cf.

concurring opinion of Black, Douglas and Murphy, JJ, in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 607).

The 5½% over-all return fixed by the Commission complied fully with these standards. It provided an allowance of 2.55% representing the actual cost on Northern's long-term debt and a return of 9.25% on common stock which, adjusted for financing charges of ½%, gave a net return to the equity owner of 8.75% (R. V 2274). This would have permitted the continuance of Northern's past practice of transferring 37.3% of these earnings to surplus and left for distribution as dividends to the stockholders enough to yield 5.49% on the book value of their stock, a figure comparing favorably with the yields of similarly situated natural-gas companies (R. V 2274).

The adequacy of this yield of 5.49% was corroborated by the fact that it approximated the past yields on Northern's own stock; Northern's average yield during the past five years had been 5.6% and its latest 5.1% (R. V 2274). In addition, the net return of 8.75% corresponded more than favorably with the indicated investment requirements of persons seeking to purchase natural gas stock as shown by reference to common stocks of seven natural-gas companies actively traded on recognized stock exchanges, which included common stocks of natural-gas companies relied on by

Northern (R. V 2274).[2] Finally the Commission double-checked the return allowed by it against Northern's own past performance and against the average earnings-price ratio, *i. e.*, the accepted indicator of return requirements of investors desiring to purchase natural-gas company stocks. Here again the Commission relied not only upon the figures prepared by its own staff but also upon the somewhat higher ones submitted by Northern (R. V 2273).[3] All tests coincided in showing that the 5½% figure would give Northern a return somewhat in excess of the average of the past five years and considerably above the figures for the Spring of 1951, which were the latest ones available. Plainly, therefore, the 5½% return allowed by the Commission complied with the test that it be high enough to maintain the company's credit and to attract new capital.[4] It follows that the over-all rate of return fully protected the investor's interest as well as Northern's financial integrity (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602).

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[2] This return averaged 8.1% during the period from 1946 to the conclusion of the hearings. It amounted to 7½% on April 30, 1951, the latest available figure (R. 2273).

[3] These figures were 8½% for the 1946 to 1951 average and 7.3% on May 31, 1951 (R. 2273).

[4] The financial data did not disclose that Northern was subject to any particular vulnerability. Nor was any claim made to that effect. As a matter of fact, Northern's gas reserves are somewhat larger than those of comparable natural-gas companies (R. IV 1918). And the low interest rate it pays on its long-term indebtedness also attests to its financial health (cf. R. IV 1715–1731).

2. (a) In reversing the Commission's conclusion as to rate of return, the court below disregarded the established standards for review of such rate determinations. Since rate determinations are largely based on financial standards, difficult to cast into legal formulae and requiring pragmatic adjustments (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602), the critical consideration is the end result, *i. e.*, the final impact of the order, not the method or the theory upon which any one of its elements is based. See cases cited at p. 6, *supra*. Hence, judicial review is confined to a determination whether the end result is just and reasonable or confiscatory. Moreover, since the order is the product of expert judgment, it "carries a presumption of validity"; the mere circumstance that it is challenged does not render it suspect. To the contrary, the party who seeks to challenge it has to bear the "heavy burden" that the consequences of the order—not the Commission's method of reaching it—are unjust and unreasonable. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602.[8]

[8] In *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 201 (C. A. 3), certiorari denied, 339 U. S. 957, the Court of Appeals properly applied these standards by refusing to interfere with the determination of a rate of return in the absence of a showing that the order was clearly confiscatory. See, also, *Colorado Interstate Gas Co.* v. *Federal Power Commission* (C. A. 10) No. 4541 (decided October 29, 1953).

The court below while professing to follow this standard of review (R. VI 2490) totally disregarded it. Instead of affording the rate order the presumption of validity and imposing upon respondent the heavy burden of showing that the end result was confiscatory, the court reversed the Commission's conclusion as to rate of return on the ground that the Commission has not sufficiently explained why it considered 5½% a reasonable rate of return, other than stating that it provides a yield to the common stock owners of Northern comparable or greater than those yielded by other natural-gas companies (R. VI 2491). And while the court's opinion goes out of its way to enumerate material in the record pointing to a higher rate of return, the court did not find that these circumstances showed convincingly that the rate order was unjust and unreasonable; it merely found that these factors militated against the order. In other words, the court below, in violation of the standards of judicial review set out in the *Hope* case, held that the rate order was suspect because challenged by contradictory evidence, that Northern had been relieved of its burden of showing convincingly that the end result was unjust and unreasonable and that, consequently, the order had to be set aside, unless it showed positively on its face not only that its end result was just and reasonable, but also that it was based on reasoning acceptable to the court.

(b) Moreover, the Commission's findings were adequate to support its conclusion. As already indicated, *supra,* pp. 4, 7–8, the Commission's conclusion was not, as the court below erroneously asserted, based merely on a comparison of dividend yields of similarly situated natural-gas companies. In addition, since the determination of rates is based fundamentally upon stubborn financial standards (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 605) and is supposed to take into consideration the investor's appraisal of the return necessary to maintain the financial integrity of the enterprise (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603), the Commission properly predicated its decision on the very basic tests the investor uses in determining whether or not he should invest his funds in the corporation, *viz,* the return on the investment and the dividend yield. Northern's financial expert conceded that dividend yields and earnings-price ratios, which are the only readily available objective evidence [6] of common stock capital cost, of necessity had to be used and be given weight, subject to the necessary adjustments (R. II 676–677).[7] They become even

[6] He termed the dividend yield the basic evidence (R. II 675).

[7] The adjustments suggested by the witness were threefold. He felt that more consideration should be paid to inflationary tendencies (R. II 650–666, 717), thus trying to revert to the reproduction cost theory rejected by this Court. Second, he felt that regardless of the stubborn facts of

more conclusive when checked back, as here, against the company's own past experience. Since the Commission was using financial data which itself take into consideration the composite of Northern's problems and those of companies having corresponding risks, it was not necessary to discuss the specific problems confronting Northern (cf. R. VI 2489) in the absence of an assertion that Northern's status was so unique as to make untrustworthy any comparison with other natural-gas companies.[8]

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actual purchases by investors, the special risks of the natural-gas companies required that they be given a net return of about 140% of the earning ratio of electric utilities (R. II 689–692, 717–718). We submit that this totally speculative argument is not entitled to much worth. Finally, the witness argued that the Commission should permit a return so high as to permit Northern to compete for capital with non-regulated business enterprises (R. II 681–682, 728, 735–736). This is at odds with the long-established holding of this Court that a regulated utility is not entitled to returns commensurate with those realized or anticipated by non-regulated enterprises. *Bluefield Water Works & Imp. Co.* v. *Pub. Serv. Commission*, 262 U. S. 679, 692.

[8] It will be noted that Northern itself felt that it was comparable with three other natural-gas companies and that the Commission used this comparison to cross-check the reasonableness of the rate determined by it (R. V 2273). See also *supra*, p. 8, fn. 4.

Other courts of appeals have recognized the sufficiency of financial materials as a criterion for the rate of return. Cf. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433, 436–437 (C. A. D. C.); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, (C. A. 10) No. 4541 (decided October 29, 1953); and see *infra*, pp. 16 to 18.

The court below stressed the circumstances that earlier opinions of the Federal Power Commission and of this Court contained considerable discussions of the individual problems of the several regulated companies. The instant opinion of the Federal Power Commission, however, explains in detail how the 5½% rate of return determined by it to be just and reasonable would be split between interest on the long term debt, the cost of financing, and the net return to the stockholders, that the latter compares favorably with Northern's own past history and with the requirements of investors "in other enterprises having similar risks," and that it permits Northern to transfer more than one-third to surplus and still leave a satisfactory dividend yield. We submit that this detailed discussion of the actual financial impact of the rate order on the company is far more informative than were the opinions of the Federal Power Commission in *Hope Natural Gas Co.*, 3 F. P. C. 150, 185–186, and *Panhandle Eastern Pipe Line Co.*, 3 F. P. C. 273, 285–286, upheld by this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, and *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635. There the Commission merely stated (see 3 F. P. C. at 186 and 285–286–287) that it considered that 6½% was a fair return without showing what net rate of return or dividend yield this gross return would allow to the stockholders and how this compared with the

requirements of persons seeking to invest in the industry.

(c) The court below apparently was greatly concerned by the circumstance that the 5½% return was the lowest allowed to any natural-gas company, and evidently felt that this involved a "pioneering change in its rate-of-return concept" requiring more elaborate explanation (R. VI 2490, 2492; see also the concurring opinion of Johnsen, J., at R. VI 2497). The fact is, however, that the Commission in this case introduced no innovations in its approach to and determination of the rate of return. The Commission here relied on substantially the same kind of evidence, drawn from the same kind of rate-of-return studies, which has uniformly been held sufficient to support the Commission's findings on rate of return. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433 (C. A. D. C.); *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230 (C. A. D. C.), affirmed, 343 U. S. 414; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, (C. A. 10) No. 4541 (decided October 29, 1953). In the *Colorado* case, *supra*, where, as here, the allowance of a rate of return

of less than 6% was used as a basis for the contention that the Commission has changed its approach to the determination of a fair rate of return, the Tenth Circuit said:

> While the rate of return of 5¾% is lower than any rate heretofore established which has been called to our attention, that in itself is not suspect nor may we overturn it merely because we as the trier of the facts might have established a higher rate. From the record we cannot say that a rate of return of 5¾% properly computed is unreasonable and therefore confiscatory.

So, here too the 5½% return allowed by the Commission was not unreasonable. This return provided an allowance covering Northern's actual cost of 2.55% of servicing its long-term indebtedness, representing 56% of its total capitalization. This, together with the 9.25% found by the Commission to be a fair return on the common stock, representing the remaining 44% of Northern's compensation, gives the 5½% figure.*

---

*This is illustrated by the following tabulation:

Capitalization Ratios	
56% bonds x 2.55% cost of borrowed money	1.43%
44% common x 9.25% return on common	4.07%
	5.50%

A calculation such as this one appearing in the Commission's opinion was misunderstood by the Court of Appeals as representing the starting point for the rate-of-return determination and a mathematical derivation of the 5½% return, whereas in fact the tabulation is merely a means of charting the end result.

3. The decision below conflicts in principle with decisions of the United States Courts of Appeals for the Tenth and District of Columbia Circuits upholding rate orders of the Federal Power Commission based upon financial data similar to those utilized in the instant case. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* (C. A. 10) No. 4541 (decided October 29, 1953);[10] *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 163 F. 2d 433, 436–437 (C. A. D. C.). In each of these cases, the Commission's determination as to rate of return was based essentially on comparative yields, earnings-price ratios and interest rates as indicative of the investors' requirements and their appraisal of the utility, and in each, the Commission's determination was approved by the reviewing court.

In *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 163 F. 2d 433, at 437, the Court of Appeals for the District of Columbia Circuit stated:

> About half of the capital of this petitioner is represented by 2½% long-term notes and the other half by equity capital. From the standpoint of the cost-of-capital rule, the 6% rate of return allowed would meet the obligation of the 2½% notes and allow

[10] Since this opinion has not yet been reported, mimeographed copies are being submitted to the Clerk for distribution to the Court. The section dealing with the rate of return begins on page 12.

> about 9½% on the common stock and surplus. The record does not furnish any other statistical test of the end result of the allowance on the equity capital. * * *
>
> Upon this evidence we cannot say that the rate of return allowed by the Commission was beyond the limit of its power, either as unreasonable, insufficient, or unsupported by substantial evidence.

And again in the very recent decision in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* the Court of Appeals for the Tenth Circuit affirmed a 5¾% rate of return,[11] saying:

> * * * it is clear to us that no consideration was given by the Commission to factors other than the financial history of nine natural gas companies subject to the Commission's jurisdiction, whose common stock was held by the public, and seven natural gas companies, whose common stock was traded on recognized exchanges, and the data with respect to Colorado's outstanding securities, its earnings and financial requirements.
>
> * * * * *
>
> It would seem that the history and experience of other successful companies engaged in the production, transportation

[11] In this case, the weighted cost of the company's long-term indebtedness representing 54% of total capitalization was 3.25%, its preferred stock (3.6% of total capitalization) had a dividend rate of 6% and the net return on common stock equity was only 8.45%.

> and sale of goods [sic: "gas"?] would furnish the best guide as to what was fair and adequate. * * *
>
> * * * * *
>
> We believe that the experience of other comparable gas utility companies, having a sound financial structure and long experience of successful operation, is a better criteria by which to gauge and determine the adequacy and fairness of rate of return than that of railroads, power transmission companies or other like utilities engaged in other fields and under other conditions and circumstances, or the rate of return on Government bonds or industrial bonds in unrelated enterprises. We do not say that such factors are not proper for consideration but on the other hand failure to give them weighty consideration does not in our opinion constitute reversible error on the record before us in light of the factors that were considered in this case.

This statement of the Tenth Circuit applies with particular force here since the seven natural-gas companies referred to by that court are the same companies, the financial data of which was relied on by the Commission here.[12]

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[12] The Tenth Circuit referred to the opinion below in the instant case as "distinguishable," but without stating in what respect.

CONCLUSION

The question presented by this conditional cross-petition is of substantial importance. We are not requesting a grant of certiorari unconditionally, irrespective of the disposition of the other petitions for certiorari, because of the desirability of bringing this litigation to an early conclusion. It is respectfully requested, therefore, that this cross-petition for a writ of certiorari be granted if the petitions for certiorari in Nos. 381 and 382 are granted.

ROBERT L. STERN,
Acting Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

NOVEMBER 1953.

APPENDIX

The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part:

* * * * *

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 19. * * *.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1953

No. 469

FEDERAL POWER COMMISSION,
Petitioner,

vs.

NORTHERN NATURAL GAS COMPANY, et al.,
Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR NORTHERN NATURAL GAS COMPANY IN OPPOSITION

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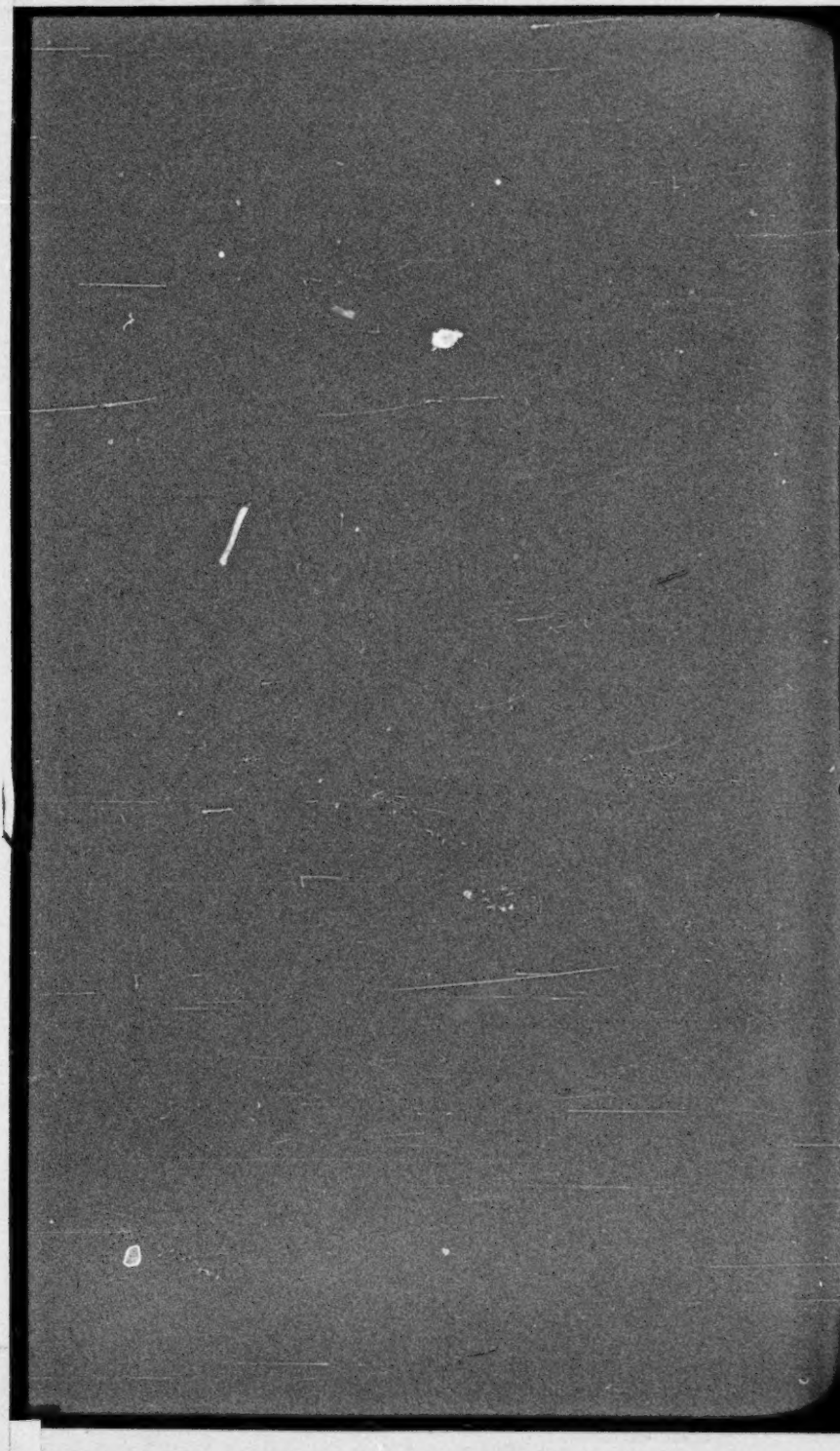

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IN THE

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October Term, 1953

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No. 469

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FEDERAL POWER COMMISSION,
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NORTHERN NATURAL GAS COMPANY, et al.,
Respondent.

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On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

o———o———o

BRIEF FOR NORTHERN NATURAL GAS COMPANY IN OPPOSITION

o———o———o

OPINIONS BELOW

The Opinion and Order of the Federal Power Commission (R. V 2257-2314) is reported at 95 P.U.R. (N.S.) 289. The Opinion of the Court of Appeals (R. VI 2433-2497) is reported at 206 F. 2d 690.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Conditional Cross-Petition.

QUESTION PRESENTED

Whether a Court of Appeals, in reviewing an order of the Federal Power Commission under the Natural Gas Act, §19(b), may, in order to effectuate compliance with the Administrative Procedure Act, §8(b), remand a case to such Commission for additional findings and conclusions essential to adequate review of the issue of rate of return.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the Natural Gas Act are set out in Appendix A, pp. 24-28, *infra*.

STATEMENT

A statement of the facts involved and of the proceedings before the Federal Power Commission and before the Court of Appeals is set out in Northern Natural Gas Company's Petition for Writ of Certiorari in No. 382 (Pet. No. 382, pp. 5-7), to which the Court is respectfully referred. The facts pertinent to the issue presented by the conditional cross-petition are set out below.

The Commission's opinion on the issue of the proper rate of return concludes in the following manner (R. V 2274):

> A 5½% rate of return would provide a return on Northern's common stock equity of 8.75% after an allowance of ½% to cover cost of financing, and which is after income taxes.

An 8.75% allowance for common equity with a 62.7% payout will result in a yield of 5.49%, which is in excess of average yields of the seven companies since 1945. We find, therefore, that a 5½% rate of return[1] for Northern is fair and reasonable.

The entire Commission opinion on the issue presented in the cross-petition covers approximately three printed pages in the record (R. V 2271-2274) and discusses only Respondent's capital structure and the historical cost of debt and equity capital, the latter as determined *solely* by comparative earnings-price ratios[2] and yields of the common stocks of several natural gas companies, including Respondent. As the Court below noted (R. VI 2491-2492) the Commission's opinion is devoid of any discussion, findings or conclusions disposing of (1) Petitioner's voluminous expert evidence, both oral and documentary, showing that "a 6% rate of return is the absolute minimum rate which would provide a return which would be 'just and reasonable,'" (2) the finding of the Presiding Examiner in his intermediate decision that "the rate of return of 6% is a fair and reasonable return which must be provided for Northern upon the present state of the record," (3) the testimony of the Commission's Staff Witness that in his opinion "a rate of return of 6 percent would allow the Company to attract capital" and whose only qualification of this position was that "5¾% *might* be adequate" [emphasis supplied], and (4) the fact that no witness testified that a rate of return as low as 5½% would be adequate.

---

1 The Commission in its cross-petition (Pet. No. 469, p. 3) states that this 5½% rate of return is to be applied to "Northern's rate base of about $140,000,000." This statement is erroneous. Respondent's rate base, as calculated by the Commission, is $129,945,031 (R. V 2271).

2 The ratio of past earnings to current market price.

The Court below found, "Aside from the statement that the Commission 'examined all of the available evidence of record,'[3] the finding that a 5½% rate of return will produce a fair and reasonable 'end result' seems to rest solely on the comparison of investors' appraisals of the common stocks of seven natural gas companies" (R. VI 2485). The Court then discussed Federal Power Commission findings and conclusions in earlier rate cases, and the decisions of this Court upholding the Commission decisions in such cases (R. VI 2486-2489) and concluded, "The Supreme Court makes it clear that there are considerations beyond that of the yield to investor[s]", citing *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591, 603 (1944) (R. VI 2489).

The Court below, having no desire to substitute its judgment for that of the Commission,[4] concluded "that this case must be remanded to the Commission with direction to set out more fully and particularly the facts and the reasons bearing on its decison as to the rate of return" (R. VI 2490), and stated (R. VI 2492-2493):

> A mere assertion that the Commission has examined "all of the available evidence of record on this subject" does not suffice to show this court, on review, that the conclusion of the Commission as to the rate of return is the result of the application of the Com-

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3 On this point, see **Beaumont, S. L. & W. Ry. Co. v United States,** 282 U. S. 74, 86 (1930), where it is stated: "The general statements in the reports to the effect that the Commission, in reaching its conclusions, considered all the pertinent evidence, add nothing to the prima facie presumption that generally attends determinations of the Commission." (Footnote supplied)

4 "We have no desire to substitute our judgment for that of the Commission, and therefore we have no occasion to set out what we feel would be a fair rate of return. **What is of importance is that we are unable from the reported findings to arrive at a reasoned conclusion that the 5½% rate of return allowed by the Commission is 'just and reasonable.'"** (R. VI 2490.) (Emphasis supplied)

mission's expertise and judgment so that we would affirm.[5] The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. §1001, et seq., is applicable to determinations made by the Federal Power Commission, and that Act provides (5 U. S. C. A. §1007(b)): "All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *." Whether the "end result" is just and reasonable we cannot say, since we do not know the findings and reasoning of the Commission except as to the rate of yield, and therefore we do not feel that the Commission's decision on the rate of return should be affirmed. Not only does the 5½% rate allowed appear to be the lowest ever allowed by the Commission, but the Presiding Examiner's finding and the testimony of the Commission's own expert rate-of-return witness militate against it.

The case must be remanded to the Commission with direction to make additional findings and conclusions upon its determination of the issue of Rate of Return, including its reasons and basis therefor so as to comply with the requirements of 5 U. S. C. A. §1007(b).

It is an important fact to note that although the decision of the Court below is based upon the Administrative Procedure Act, the Federal Power Commission makes absolutely no reference to such Act in its conditional cross-petition.

The fact that the Commission totally ignores the basis of the decision of the Court below in presenting the question to this Court, makes the "Question Presented", as framed in the Petition (Pet. No. 469, p. 2), wholly inapplicable to the instant case and results in asking this Court to review a question irrelevant to the decision below.

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5 See footnote 3, supra.

ARGUMENT

I.

THE QUESTION PRESENTED IS NOT ONE APPROPRIATE FOR REVIEW BY THIS COURT

a. The Court Below Determined Only a Procedural Matter Which Is Neither a Final Order on the Merits nor Fundamental to the Further Conduct of the Case.

Petitioner misconceives the problem presented by the ruling of the Court of Appeals on the issue of rate of return. In its cross-petition, the Commission argues at great length the question of substantiality of evidence.[6] To do so is to discuss a question that the Court below has not yet reached, although Respondent contended vigorously before the Commission and before the Court of Appeals and still contends that there is *not* substantial evidence in the record to support a determination of a 5½% rate of return. The necessary inference to be drawn from the opinion of the Court below is that it has not and could not yet consider the question of substantiality of the evidence because the findings made by the Commission were so inadequate. It is imperative to keep in mind that the *real* question presented concerns the authority of the Court below to remand the Commission Opinion for findings and conclusions, as well as the reasons or basis therefor, to effectuate compliance with the Admin-

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6 With respect to substantiality of evidence it is of interest to note, as did the Court below (R. VI 2492), that no witness in this proceeding, expert or otherwise, for the Commission or for the Respondent, testified to or recommended a rate of return as low as 5½%, and that the Presiding Examiner found that a 6% rate of return was reasonable (R. VI 2491). That the hearing examiner's findings under the Administrative Procedure Act, §8(b), become a part of the record and must be considered on review was settled by **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474, 492-497 (1951).

istrative Procedure Act, §8(b). See Appendix A, p. 26, *infra.*)[7] This question is one involving merely the procedural aspects of the Commission decision. The Court of Appeals has ordered the Federal Power Commission to fulfill its duty under the Administrative Procedure Act, §8(b), in order that the Court may properly discharge its obligation of review under that same Act, §10(e) and under the Natural Gas Act, §19(b). (See Appendix A, pp. 27, 24-25, *infra.*)

In view of these circumstances the cross-petition should be denied. Since the Court of Appeals has not yet passed upon the question of substantiality of evidence and rendered a final judgment, orderly judicial administration would be abetted by denial of the cross-petition.

In several recent cases this Court has indicated that it does not review judgments that are not final, except where review involves an issue fundamental to the further conduct of the case—a situation which is not here present. (*Larson vs. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685 (1949); *Land vs. Dollar*, 330 U. S. 731, 734 (1947); *U. S. vs. General Motors Corp.*, 323 U. S. 373, 377 (1945)). In the case at bar the ruling of the Court of Appeals is certainly not finally dispositive

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7 Petitioner's misconception of the question is clearly indicated by its statement in footnote 4 on page 8 of the Petition in No. 469. There Petitioner states: "The financial data did not disclose that Northern was subject to any particular vulnerability. Nor was any claim made to that effect. As a matter of fact, Northern's gas reserves are somewhat larger than those of comparable natural-gas companies (R. IV 1918). And the low interest rate it pays on its long-term indebtedness also attests to its financial health (cf. R. IV 1715-1731)." What is of interest in the foregoing statement is that **no such findings or conclusions were made, much less statements of the reasons or bases therefor,** in the Federal Power Commission's opinion and order. Petitioner is now attempting to make findings **post hoc** in its Petition in this Court in an effort to support its order.

of the case and it clearly is not a ruling which is fundamental to further proceedings. Such ruling does not relate to a jurisdictional or substantive matter. Rather it is a procedural ruling, the fulfillment of which is necessarily precedent to the Court of Appeals' consideration and disposition of the substantive question of substantiality of evidence.

The Court below has merely attempted to enforce orderly procedure in an administrative action as required by the Administrative Procedure Act, §8(b). If certiorari is to be granted on such issues it will defeat the very purpose of the Administrative Procedure Act imposing on Courts of Appeals reviewing under Section 19(b) of the Natural Gas Act, the responsibility of keeping administrative bodies, such as the Federal Power Commission, within reasonable bounds (cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 489-490).

In furtherance of proper judicial administration and in consideration of the inter-relationship of the federal appellate courts and their respective functions, this Court should deny the conditional cross-petition for certiorari.

b. The Action of the Court Below in Remanding for Compliance with the Administrative Procedure Act, §8(b), is Within the Normal and Primary Responsibility of Courts of Appeals Under the Administrative Procedure Act, the Natural Gas Act and the Decisions of This Court.

The "exclusive jurisdiction" given Courts of Appeals on petitions for review of Federal Power Commission orders (Natural Gas Act, §19(b)) should operate as a conclusive deterrent to granting this cross-petition for certiorari. Keeping in mind the fact that the Court of

Appeals "has not reversed the conclusions of the Commission, except in the procedural sense necessary to a remand,"[8] we direct attention to the review provisions of the Natural Gas Act, Section 19(b) (52 Stat. 831, 15 U. S. C. §717r(b)), which provides in part:

> Upon the filing of such transcript [of the record before the Commission] such court [of Appeals] shall have *exclusive jurisdiction* to affirm, modify, or set aside such order in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification * * *. (Emphasis supplied)

Such portion of the Natural Gas Act is analogous to the portions of the Taft-Hartley Act (§10(e), 61 Stat. 148, 29 U.S.C. (Supp. III) §160(e)) quoted in *N. L. R. B. vs. Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1951), as follows:

> The jurisdiction of the court [of Appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *.

In the *Pittsburgh Steamship* case, the issue discussed was the substantiality of evidence—a substantive matter as distinguished from the procedural remand for additional findings here involved. In that case, after setting out the review provisions of the Taft-Hartley Act, supra, the Court stated (340 U.S. 502):

> * * * Congress has charged the Courts of Appeals and not this Court with the normal and primary re-

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8 See Mississippi River Fuel Corp. v. F. P. C. (C. A. D. C.), 163 F. 2d 433, 452 (1947).

> sponsibility for granting or denying enforcement of Labor Board orders. * * * Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority[9] between the Circuit Courts of Appeals."

Certainly, there are no "principles the settlement of which is of importance to the public" involved in the remand for additional findings in the instant case. If review of such rulings by Courts of Appeals is to be granted, this Court will not be permitting those Courts to exercise the "exclusive jurisdiction" provided for by Section 19(b) of the Natural Gas Act and to assume the responsibility placed on such Courts by the Administrative Procedure Act and the decisions of this Court. As this Court stated (again with reference to the substantiality of evidence) in *Universal Camera Corp. vs. N. L. R. B.*, 340 U. S. 474, 489-490:

> Some scope for judicial discretion in applying the formula [for judicial review of administrative action] can be avoided only by falsifying the actual processes of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work. * * *
>
> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. *Reviewing courts must be influenced by a feeling that they are*

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9 On this point, see pp. 12-18, infra.

> *not to abdicate the conventional judicial function.* Congress has imposed on *them* responsibility for assuring that the Board keeps within reasonable grounds (Emphasis supplied).

Exactly the same criterion must be applied to review by Courts of Appeals of Federal Power Commission orders under the Natural Gas Act. Congress, through the Administrative Procedure Act, has ordered administrative agencies to make findings and conclusions, and to state the reasons or basis therefor, and a Court of Appeals under the Natural Gas Act has the responsibility to enforce that Congressional mandate.

It is most difficult for a reviewing court to fairly and accurately appraise the substantiality of evidence, and before undertaking that difficult task (which is peculiarly within their province) it is eminently proper that the court have the benefit of adequate findings, conclusions and reasons from the administrative agency on all material issues of law, fact and discretion. The Court below has not required, as stated by the Federal Power Commission (Pet. No. 469, p. 10), that the Commission order be "based on reasoning acceptable to the court." Such Court has simply held that the Commission order must comply with the requirements of the Administrative Procedure Act, §8(b). In so doing the Court of Appeals has followed precisely the dictates of this Court where, in *Colorado-Wyoming Gas Co. v. F. P. C.*, 324 U. S. 626, 634 (1945), Mr. Justice Douglas, speaking for the Court, stated:

> Sec. 19(b), 15 U.S.C.A. §717r(b) says that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." But we must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly

> emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. [Citing cases.] Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. §19(b). *The courts cannot perform the function which Congress assigned to them in absence of adequate findings.* (Emphasis supplied)

The Federal Power Commission in effect takes the position that matters of a fair hearing, proper findings, and other statutory procedural requirements, may be ignored if the "end result" does not effect confiscation.[10] Such a contention is so contradictory of fundamental rights that it cannot be said to be proper.

c. The Decision of the Court Below Does Not Conflict With Decisions of Other Courts of Appeals.

1. Petitioner states (Pet. No. 469, pp. 16-17) that the decision below conflicts in principle (not directly) with the decision of the Court of Appeals for the District of Columbia in *Mississippi River Fuel Corp. vs. Federal Power Commission*, (C.A. D.C.), 163 F. 2d 433 (1947). It should be kept foremost in mind that the question in such case was the substantiality of evidence to *support the findings* on rate of return. In the instant case the Court below has not yet even reached the question of substantiality of evidence since it *found the Commission findings inadequate.*

An examination of the decision in the *Mississippi River Fuel* case discloses that the Court of Appeals for the District of Columbia not only does not disagree with

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10 See Question Presented, Pet. No. 469, p. 2.

the Eighth Circuit but instead *expressly agrees* that a Court of Appeals *can* and *must* test the adequacy of the findings made by the Federal Power Commission. In the *Mississippi River Fuel* case, 163 F. 2d 433, 436-437, the Court stated:

> Under the rule laid down by the Supreme Court in the Hope Natural Gas Company case, the court is restricted in its review of a Commission rate of return allowance to a test of the end result of the order, *and, of course, the adequacy of the findings* and the sufficiency of the evidence supporting the findings. (Emphasis supplied.)

Clearly there is no conflict in principle between the two circuits with respect to the question presented, namely, the authority of a Court of Appeals to remand a Federal Power Commission decision for additional findings.

Indeed, in its opinion denying Petition for Rehearing in the *Mississippi River Fuel* case (163 F. 2d 433, 450-452), the Court, in a blunt criticism of exactly the same Commission views as are expressed in the cross-petition in this case stated:

> The Commission says that a reviewing court is limited to a consideration of the "end result", the rate, or price, prescribed by the final rate order for the commodity or service. * * *
>
> The danger of misunderstanding and confusion arises because the Commission's premise stems from a trite and true generality. It is true that, if the rate prescribed by the Commission be fair, reasonable and non-confiscatory, a court cannot disturb it. The questions are: *When* is a rate fair, reasonable and non-confiscatory? And *how* does a court determine whether the rate is so or not? The Commission seems to contend that the court must examine the rate per se, as an abstraction, or as a naked economic fact, divorced from the elements of which it is composed

and regardless of its effects; and if it appears fair and reasonable upon such examination, it must stand. *Such contention is without merit, either upon reason or upon authority, and moreover is impossible of practice.* * * *

* * * the Commission, even though expert, is forbidden to be arbitrary. And the courts are directed to prevent it from being so. The Commission cannot, and we do not understand it to claim that it can, shield arbitrariness by averments of its own infallibility, by technical expressions *or by failure to state adequate reasons for its conclusions.* This court, in the present case, has not reversed the conclusions of the Commission, except in the *procedural sense necessary to a remand.* It has remanded the case for clarification where clarity is not present, and for completion where incompleteness now exists. When the findings and conclusions are *complete* and *clear,* the court will then, if appropriate proceedings are brought, consider whether the ultimate rulings of the Commission are within the permissible bounds of its power. The Commission says that the court has substituted its judgment for that of the Commission. The court has not done so. That contention in the present case is merely the recitation of a favorite cliche of administrative tribunals whose findings and conclusions have been queried by a court. (Emphasis supplied)

If the Commission is contending that the Court in the *Mississippi River Fuel* case sanctioned exactly the same kind of findings that were criticized in the instant case, an examination of the Commission decision in that case discloses patent substantial differences from the situation in the instant case in respect to the record and findings. In the *Mississippi River Fuel* case where the company was contending for a 6½% rate of return, the following facts existed:

1. Mississippi River Fuel "offered no evidence on rate of return" (63 P. U. R. (N. S.) 89, 98).[11]

2. There was no intermediate decision of a Presiding Examiner upholding the Company contention for a 6½% rate of return.[12]

3. The Company did not raise the question of insufficient findings on the issue of rate of return (163 F. 2d 89, 98).

In the instant case, where this Respondent is contending for a 6% rate of return, the following facts exist:

1. Comprehensive expert testimony, both oral and documentary, was offered by this Respondent showing that a 6% rate of return was the absolute minimum which would provide a just and reasonable return (R. II 625-752, 936-994, 1009-1163, 1169-1176; R. IV 1819-1968), of which there is no mention or disposition made in the Commission's opinion (R. VI 2491).

2. There was an intermediate decision of the Presiding Examiner upholding this Respondent's contention for a 6% rate of return (R. V 2255), of which there is no mention or disposition made in the Commission's opinion (R. VI 2491).

3. The question of insufficient findings was clearly raised by Respondent in its application for rehearing before the Commission (R. V 2366-2369) and in its petition for review in the Court below (R. I 20-25).

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11 The Court's statement that "the company introduced evidence upon the matter" of rate of return (163 F. 2d 436) is not compatible with the statement in the Commission's opinion that "the Company offered no evidence on rate of return" (63 P.U.R. (N.S.) 98). We accept the statement of the Commission as trier of the facts.

12 This action was commenced prior to the effective date of the Administrative Procedure Act and the proceedings were not subject to the provisions of such Act. See §12, 5 U.S.C. §1011 (Appendix A, pp. 27-28, infra).

In addition in the instant case, as the Court below found, the "Presiding Examiner's finding and the testimony of the Commission's own expert rate-of-return witness militate against" the Commission decision (R. VI 2492). Clearly, therefore, when considered in the light of the record facts in the respective cases, there is no conflict between the decision of the Court of Appeals (D. C.) in the *Mississippi River Fuel* case and the decision of the Court below in the instant case.

2. Petitioner also alleges that there is a conflict in principle (not directly) between the Eighth Circuit and the Tenth Circuit, as disclosed by a comparison of the opinion of the Court in the instant case with the opinion of the Tenth Circuit in *Colorado Interstate Gas Company vs. Federal Power Commission,* No. 4151, decided October 29, 1953.[12a] In that opinion, at p. 16 of the mimeographed copy distributed to this Court by Petitioner, the Court of Appeals stated:

> The late case of *State Corporation Commission of the State of Kansas v. Federal Power Commission* [the instant case], decided by the Eighth Circuit on July 20, 1953, in which the findings and order of the Commission were reversed and remanded in part for further consideration with respect to making additional findings, has been called to our attention. It is sufficient to say that in our opinion the two cases are distinguishable and that the *facts* in this case do not warrant similar treatment other than above indicated. (Emphasis supplied)

There is not the faintest indication in the Tenth Circuit decision that such Court disagreed with the decision of the Eighth Circuit in the instant case, holding that a reviewing Court of Appeals may remand a Fed-

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12a The 10th Circuit by Order issued Dec. 8, 1953, vacated its judgment and granted F. P. C.'s Petition for Rehearing. A like petition filed by Colorado Interstate on the rate of return issue is still pending.

eral Power Commission decision in an appropriate case, for adequate findings and conclusions to effectuate compliance with the Administrative Procedure Act, §8 (b). It is evident that the Court of Appeals for the Tenth Circuit felt that the case before it either did not present the same deficiency in findings, as did the case before the Eighth Circuit, or the question of adequate findings was not properly preserved or presented. If one does not assume, as does the Federal Power Commission, that the Court of Appeals for the Tenth Circuit does not know what it is saying when it states that the two cases are distinguishable, an examination of the decisions reviewed discloses differences in the two cases.

The Federal Power Commission opinion in the *Colorado Interstate* case, 95 P. U. R. (N. S) 97, 112-114, contains a discussion of the testimony of Colorado Interstate's rate-of-return witness and a statement of the reasons why the Commission did not accept that witness's testimony. In the instant case the Commission did not even attempt to discuss, explain away or dispose of the comprehensive expert evidence presented by Respondent's rate-of-return witness showing that a 6% rate of return was the absolute minimum that would provide a just and reasonable return to Respondent (R. VI 2491), and the finding of the Presiding Examiner that a 6% rate of return must be provided for Respondent (R. VI 2491).

Further, the Commission, in its Opinion No. 235-A, denying rehearing in the *Colorado Interstate* case, Docket No. G-1115, states (Mimeo. Ed., p. 4):

> Colorado attacks our allowance of a 5.75% rate of return contending that:
>
> (1) We did not allow present cost of debt capital but, instead, used an historical rate of 3.21%;
>
> (2) We did not allow that extra "fillip" as Colo-

rado puts it which is necessary to attract money in the future; and

(3) In determining the reasonable cost of common stock capital we erred in applying earnings-price ratios in relation to the book value of the common stock.

The question of compliance with the Administrative Procedure Act, §8(b), was evidently not raised before the Commission on application for rehearing, and, therefore, the Court of Appeals could not consider that particular objection when reviewing the case.[13] There can no longer be any doubt that procedural rights under the Administrative Procedure Act can be waived. *United States, et al. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952).

There is no conflict in principle on the issue of rate of return, as alleged by Petitioner (Pet. No. 469, pp. 16-18), between the decision of Eighth Circuit below and the decision of Court of Appeals, District of Columbia and Court of Appeals, Tenth Circuit in the *Mississippi River Fuel* and *Colorado Interstate* cases, respectively.

II.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

Petitioner also argues that the findings the Commission made "were adequate to support its conclusion" (Pet. No. 469, pp. 11-13). The question as presented to

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13 "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." Natural Gas Act, §19(b); 15 U.S.C. §717r(b).

this Court by the Federal Power Commission (Pet. No. 469, p. 2) is not premised on and disregards the adequacy or inadequacy of the findings made. As presented in the cross-petition the same question would be before this Court if *no* findings were made so long as the rate of return fixed was alleged to be "based upon substantial financial data."[14] This in turn means—since §8(b) of the Administrative Procedure Act unequivocally directs that decisions of administrative bodies include "findings and conclusions, as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record"— that Petitioner, in order to make its argument germane to its "Question Presented," *must* contend that such Act does not apply to it. The definition of "Agency" in Section 2(a) of the Administrative Procedure Act (60 Stat. 918, 5 U. S. C. §1001(a), as amended)[15] clearly includes the Federal Power Commission. The Court below so held (R. VI 2492).

Although the issue as to the adequacy of findings is not determinative of the Question Presented, there can be no doubt that the findings were inadequate. There were absolutely no findings or conclusions other than the arithmetical calculations that the rate of return allowed would permit an allowance of "8.75% for common equity" which would "result in a yield of 5.49%, which is in excess of average yields of the seven companies since 1945" (R. V 2274). According to the decided cases, the Federal Power Commission is to exercise its expert judgment

14 The Question Presented assumes that the order of the Federal Power Commission was based upon substantial evidence ("substantial financial data"). Respondent repeats that this is a gratuitous assumption in that the Court of Appeals has not yet considered that question.

15 See Appendix A, pp. 25-26, infra.

—its expertise. See, e.g., *Bluefield Waterworks & Improvement Co. vs. Public Service Commission*, 262 U. S. 679, 692 (1923) (cited by the Commission in its opinion herein, R. V 2271), where it is stated:

> What annnal rate will constitute just compensation depends upon *many* circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to *all* relevant facts. (Emphasis supplied)

If the exercise of that "fair and enlightened judgment" necessitates only elementary arithmetical calculations and a comparison of the answers obtained, then in reality no expert judgment is necessary. *Anyone* can be an "expert" in rate of return matters. Such an absurd result would strike at the very foundation and purpose in delegating authority to administrative agencies in the first instance, since such agencies are established to deal initially with problems too complex and intricate to be dealt with expeditiously by the courts.

That the decision of the Court below has had a most salutary effect on Federal Power Commission decisions is quickly shown by an examination of the Commission's Opinion No. 258, *In the Matter of United Fuel Gas Company*, Docket Nos. G-1781 and G-2055, decided after the decision in the Court below.[16] There the Commission in discussing its obligation to exercise a fair and enlightened judgment having regard to *all* relevant facts in determining rate of return said (Appendix B, p. 35, *infra*):

> This has recently been emphasized in the Opinion of the Court of Appeals for the Eighth Circuit, remanding to this Commission for further findings the determination that 5½%, in the circumstances of that

16 See Appendix B, pp. 29-37, infra.

case, constituted a fair rate of return for the Northern Natural Gas Company.[14]

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14 *State Corp. Comm. of the State of Kansas v. FPC* 14,704 and *Northern Natural Gas Company v. FPC*, 14,706, 14,733 and 14,743, CCA 8th (July 20, 1953). The Court said, "in the case under review we are not given any indication that the Commission has so exercised its practical, expert judgment. We are given instead a study that the Commission has made as to the rate of yield of various gas companies. * * * [R. VI 2489]

A comparison of that opinion on the issue of rate of return with the Commission's opinion in the instant case on the same issue (R. V 2271-2274) points out the glaring deficiencies of the latter. Clearly there are no "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record" in the instant case that satisfy the requirements of the Administrative Procedure Act, §8(b).

The inadequacy of the Commission's findings and conclusions is pointed up in the opinion of the Court below where the Court lists four points on which it expresses dissatisfaction with the total lack of findings and supporting reasons disposing of record evidence. The Court found no mention or disposition in the Commission opinion of the following matters of record, as previously noted, p. 3, supra (R. VI 2491-2492):

(1) Petitioner's voluminous expert evidence, both oral and documentary, showing that "a 6% rate of return is the absolute minimum rate which would provide a return which would be 'just and reasonable' ";

(2) The finding of the Presiding Examiner in his intermediate decision that "the rate of return of 6% is a fair and reasonable return which must be pro-

vided for Northern upon the present state of the record";

(3) The testimony of the Commission's Staff Witness that in his opinion "a rate of return of 6 percent would allow the Company to attract capital" and whose only qualification of his position was that "5¾% *might* be adequate" [emphasis supplied]; and,

(4) The fact that no witness testified that a rate of return as low as 5½% would be adequate.

Where a Court of Appeals reviewing a Federal Power Commission decision under the provisions of the Natural Gas Act, §19(b) and the Administrative Procedure Act, §8(b), on a factual situation such as presented to the Court below, finds no expression concerning or disposing of factual matters such as those set out above, it cannot be denied that such a Court of Appeals has acted properly and within the scope of Congressional mandates providing standards for review, when it remands such a case to the Commission for further findings and conclusions.

Respondent submits that the decision of the Court below on the facts in the instant case is clearly correct.

CONCLUSION

The decision below is clearly correct to the extent that it has been attacked by the Federal Power Commission in its Cross-Petition in No. 469. The Court below, in the proper exercise of its reviewing powers under the Natural Gas Act, has remanded the case and ordered the Commission to comply with the Administrative Procedure Act, §8(b). There is no conflict of decisions and no occasion for this Court to review this procedural matter and thereby disrupt the administrative-judicial relations of the Federal Power Commission and the Court of Appeals as established by Congressional mandate. The question presented, besides being one which is not ripe for review since it is not finally dispositive of the issue, is certainly not a substantial federal question. The cross-petition for certiorari should be denied.

Respectfully submitted,

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December, 1953

APPENDIX A

Natural Gas Act

[Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U. S. C. §717-717w; as amended.]

• • •

Section 19. *Rehearing; Court Review of Orders*

• • •

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and

that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347). [52 Stat. (1938); 15 U. S. C. 717r(b) (1946)]

Administrative Procedure Act

[Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U. S. C. §§1001-1011; as amended]

* * *

Sec. 2. As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives

of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

* * *

Section 8. *Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record*

* * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242; 5 U. S. C. §1007(b)]

* * *

Section 10. *Judicial review of agency action*

* * *

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243; 5 U. S. C. §1009(e)]

* * *

Section 12. *Impairment of rights; effect on other laws; separability; subsequent legislation; effective date*

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law,

all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement. [60 Stat. 244, 5 U. S. C. §1011.]

APPENDIX B

Excerpts (pp. 24-32) from mimeographed edition of Federal Power Commission's Opinion No. 258, In the Matter of United Fuel Gas Company, Dockets No. G-1781 and G-2055, issued August 7, 1953.

Rate of Return

Columbia owns virtually all the outstanding securities, debt and equity of United. The minority interest amounts to 4/1000 of one per cent of the common. With this exception, everything which United earns accrues to Columbia. According to the record United's capital as of September 30, 1952, amounted to $108,344,438 and was composed of 48% debt and 52% equity. Debt included $21,825,000 of 6% Demand Notes which, according to testimony, are "frozen" by reason of tax considerations, although the effective interest rate thereon has been reduced to 3¼ per cent. Current debt financing is by means of Installment Promissory Notes and Short-Term Loans of which there was an aggregate of $30,162,000 outstanding as of the above date. Equity financing is accomplished by means of capital contributions from Columbia to United Fuel.

United Fuel claims that it is entitled to 6½ per cent rate of return on its total investment rate base. Its chief witnesses on rate of return were Mr. Francis H. Crissman, Treasurer of Columbia, and Dr. Ralph E. Badger, an economist.

Mr. Crissman claimed that a rate of return of at least 7% was required, basing his contention on a cost of money to Columbia of 6.83%. Dr. Badger concluded that a fair return for United would be between 7 and 7½%, and indicated that in arriving at this figure he had

included debt capital of Columbia at a replacement cost of 3.5% and equity capital at 11%. The latter rate, he said, had been selected after a study of the way in which the earnings of variously constituted groups of natural-gas companies had developed over the past decade.

Using a series of "growth factors" derived from these studies Badger projected earnings ten years ahead, averaged them and compared the averages with *current prices* for these companies' stocks, claiming that current prices discounted such growth. In this way he arrived at a series of earnings-price ratios from which he selected one which he thought suitable to United, and based his cost of equity capital on that.

Long range forecasts of this nature do not provide a sound and reliable basis for present decisions as to what is required to give United's parent company, Columbia, ready access to capital markets in order that it may keep United and its other subsidiaries supplied with capital funds. Also there is considerable doubt as to whether the stock market is this far sighted.

Mr. Crissman testified that the present debt capital of Columbia, consisting of debentures, had been obtained on a cost basis of 3.02%. To this 3.02% he would add 0.14%, representing annual amortization of debt discount, expenses and premiums relating to debt issues which have long since been retired and such items charged to earned surplus. As to this latter point, it is our opinion that the cost of getting rid of uneconomic debt is little different from expenses resulting from unexpected disasters, fires, hurricanes, transmission line breaks, or technological displacements such as the substitution of natural for manufactured gas in a utility's distribution sys-

tem. Such occurrences are among the risks inherent in the junior or equity stock position and they are properly chargeable against surplus as of the time they occur.

Mr. Crissman indicated that he believed the cost of equity capital to be taken into account should be 10.5%. He based this claim on Columbia's experience in disposing of its three post-war stock offerings; on the average relationship of Columbia's earnings to the market price for its stock since 1948, and on a ratio of dividends to earnings.[8]

The period from January 1, 1948, through 1952, has been significant for Columbia from a financial viewpoint, for in that interval it has sold all its presently outstanding debentures and thrice offered common stock to its stockholders on a subscription basis. As of the conclusion of these hearings the latest occasion on which it had made a stock offering was during November 1951 when 1,501,826 shares had been sold at $14.25 a share, which price was about 6.6% under the market. The net proceeds of this offering were $13.825 a share, or about 9.5% under the market, the market being about 15¼. The prevailing ratio of earnings to average market price during November, 1951, was 7.9%; the payout ratio visible at the time was 75.9%.

At oral argument in these proceedings United's counsel stated that a fourth offering of common stock had been made during May, 1953. This stock was sold to underwriters and the price which Columbia received there-

8 Mr. Crissman asserted that the historical "payout" ratio of Columbia had been about 65-70%. However, in the first eight months of 1952 payout had averaged 83.7% and in August, 1952, the last month for which information is of record, the payout had been 100%.

for, which was $12.65 a share, was determined by competitive bidding. Earnings at the time of this offering were 88 cents a share, the prevailing dividend rate was 90 cents a share, the earnings-bid price ratio was 6.9%, and the earnings-net proceeds ratio would be 7.2% if expenses were no greater than they were in 1951.[9]

Over the 1948-1952 period, which has been such a significant period in Columbia's development, the monthly earnings market price ratios of Columbia's common have ranged from a high of 12.9% in February, 1948, to a low of 6.3% in August, 1952. Over this four and a half year period these ratios have averaged 9.0%, the yield 6.2% and the payout 71%.

Over approximately the same period the monthly average earnings-price ratios of eight natural gas stocks which are listed on national security exchanges, as shown in the Staff's Exhibit,[10] have ranged from a high of 9.3% in June 1949, to a low of 6.0% in March, 1952. The average for their period was about 7.7%.

The monthly earnings-price ratios of three unlisted natural gas company stocks, appearing in the Staff's Exhibit[11] from January, 1949, through November, 1952, range

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9 The stock was reoffered to the public at $13.25 a share. The range of prices at which the stock had sold on the New York Stock Exchange between January 1, 1953, and April 28, 1953, was 15 high, 13 low. (Prospectus dated May 13, 1953).

10 These stocks are: Consolidated Gas Utilities Corp. common; El Paso Natural Gas Co. common; Lone Star Gas Co. common; Mississippi River Fuel Corp. common; Mountain Fuel Supply Co. common; Northern Natural Gas Co. common; Panhandle Eastern Pipe Line Co. common; and Southern Natural Gas Co. common.

11 These stocks are: Tennessee Gas Transmission Co. common; Texas Eastern Transmission Corp. common; and Texas Gas Transmission Co. common.

from a low of 6.0 early in 1950 to a high of 10.0 in May 1951, and stood at 7.0 for the last month of this period. The average for this period and these stocks was about 8 per cent. Since 1948 and through 1951 the yields on the eight listed and two unlisted stocks which were dividend payers in this period averaged somewhat under 5.0%; the payout ratios 50.0%. It would thus appear that Columbia Common runs at a somewhat greater relationship of earnings to market than either of these indices.

The Staff contends for an allowance to United Fuel of a rate of return of 6%, which it points out, would be the return to Columbia on its investment in United Fuel. If allowance be made out of this return for Columbia's own debt at 3.03%, assuming the proportion of debt to total capital to be 54.5%, the residual return on Columbia's equity on United Fuel would be at the rate of about 9.6%.[12] This, the Staff points out, would be sufficient to sustain a yield of 6.2% on Columbia's Common Stock, with a payout of 66⅔%, and would, it is contended, be generally consistent with the stock market's evaluation of Columbia's earnings and dividends over the 4½ years preceding August 1952.

This 6% rate of return, however, would make little or no allowance beyond the bare-bones cost of money to United Fuel and the Columbia System. Moreover, it would reflect a period during which money market conditions generally were relatively favorable for the sale of equity securities, and interest rates on senior securities were relatively low.

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12 United Fuel's return and Columbia's return on its investment in United Fuel 6.00%
Less allowance for Columbia's 54.5% debt at 3.03%..... 1.65%
Return to a 45.5% equity at 9.56%..... 4.35%

As the Supreme Court of the United States said in the Bluefield case:

> "Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent . . . is substantially too low to constitute just compensation for the use of the property employed to render the service."[13]

We are, of course, concerned with rates for the future. Interest charges have lately risen perceptibly; whether the securities markets will continue at their present levels is a matter of uncertainty. Without clairvoyance in the matter, it would be less than responsible for us to resolve against Columbia all doubts respecting the course of the money markets over the next 18 months, during which period there is every indication that the system will be required to raise very substantial sums of additional capital for necessary expansion.

Furthermore, we must bear in mind the fact that, as the Supreme Court of the United States recognized as long ago as the *Bluefield* case:

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of fair and enlightened judgment, having regard for all relevant facts. . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."[13a]

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13 **Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679, 695 (1923).**

13a **262 U. S. 679, 692-693 (1923).**

We have never held that our responsibility for determination of the fair rate of return can be discharged properly through the mere application of a strict cost-of-money formula to produce the minimum return which might be nonconfiscatory; rather we must exercise a fair and enlightened judgment having regard for all relevant facts. This has recently been emphasized in the Opinion of the Court of Appeals for the Eighth Circuit, remanding to this Commission for further findings the determination that 5½%, in the circumstances of that case, constituted a fair rate of return for the Northern Natural Gas Company.[14]

Among other matters which we must consider are the essential nature of proceedings in which rates are fixed prospectively, the recent financial history and foreseeable new capital requirements of the particular company under consideration, and its relative position in comparison with other natural-gas systems whose rates recently have been, and are, before us,—for it is in the interest of investors and consumers alike that a healthy financial condition exists which will preserve investments made and assure the rendition of reasonably adequate service. It is necessary that we keep in mind the fact that, in disposing of questions regarding rates of return, we are dealing with a residual difference between two groups of estimates; estimates of revenues and estimates of costs of

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14 **State Corp. Comm. of the State of Kansas v. FPC, 14,704 and Northern Natural Gas Company v. FPC, 14,706, 14,733 and 14,743, CCA 8th (July 20, 1953).** The Court said, "in the case under review we are not given a[n] indication that the Commission has so exercised its practical, expert judgment. We are given instead a study that the Commission has made as to the rate of yield of various natural gas companies. . . . It is clear also that the Commission is not bound to the use of any particular formula or group of formulae in determining what is a just and reasonable rate." (Advance Ed., p. 60).

service exclusive of return. If actual revenues received or actual operating expenses incurred should deviate from our estimates in only small degree, the resulting effect on return could be very considerable. This, of course, might be to the advantage or to the disadvantage of any given company. However, consideration of Columbia's somewhat unsatisfactory recent financial record, as well as its large and imminent capital requirements, make it doubly necessary to avoid unintentionally restricting earnings by undue reliance on the accuracy of our estimates of revenues and expenses.

Turning to the financial situation of the Columbia System, earnings per share on its stock have shown a marked tendency to decline during the past several years. Dividend coverage has been limited, and the market value of the shares has been reduced at times to a figure below the actual investment represented thereby. Thus, Columbia's offering of 1,700,000 shares of Common Stock early in May 1953 netted the company only $12.57 per share as compared wtih a book value, as of April 30, 1953, of $13.18; and maintenance of the established 90c dividend has resulted in a payout of more than 100% of net earnings per share for the calendar year 1952 and for 1953 to date, with no indication that this situation will be improved during the full calendar year.

Of course, we have no responsibility to insure any particular dividend rate. It is, however, a cardinal principle of regulation that the return should be sufficient to attract capital—which it is evident that the Columbia System will need in large amounts in the early future if it is to approach a satisfaction of the requirements of its customers for natural gas. In the circumstances here prevailing, that principle seems to us to mean a con-

servative capitalization, a not inefficient pattern of operation, and an income over-all sufficient to attract capital on relatively favorable terms.

Columbia has resisted the lure of an undue thinning of the equity and has maintained a conservative capital structure. Return should be sufficient to encourage continuation of this practice. Moreover, our responsibility to encourage necessary expansion of facilities for the purpose of rendering adequate service is no less than our responsibility to insure that service be supplied at reasonable rates. A return limited to the bare cost of money will not encourage conservative financial practices nor will it encourage adequate enlargement of service facilities. While a return equal only to the strict historical cost of capital may be legally defensible as nonconfiscatory, it seems evident, in the circumstances of this case, that 6% would exceed the cost of capital by so little, if at all, as to be less than reasonable. We conclude, therefore, that a rate of return of 6¼% is fair and reasonable in this instance.